Governor Pete Wilson

A PLANNER'S GUIDE TO FINANCING PUBLIC IMPROVEMENTS

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Introduction

California is often looked upon as a leader in innovative methods for financing new public infrastructure and programs. The citizens' "taxpayer revolt" of the late 1970's, represented by the twin measures of Proposition 13, the property tax limitation initiative, and the "Gann limit" on governmental appropriations, relieved many landowners of a property tax burden that they considered onerous. Once primarily dependent on property tax revenues to fund public works facilities, as well as other programs, local governments and school districts have sought alternative methods for raising funds to finance needed public works projects.

Today, local government relies upon a mixture of old and new procedures for raising revenue. Property taxes still do their part. However, revenue sources that were once considered minor, such as special taxes and benefit assessments, are becoming increasingly common. Impact fees and leaseback agreements are at the crest of a "new wave" of alternative financing mechanisms.

In November 1996, California voters enacted Proposition 218, a Constitutional amendment which "protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent." Proposition 218 now requires voter approval prior to imposition of general taxes, assessments, and certain user fees. It radically changes the way in which local government, including charter cities, raises revenues. From now on, the process will be slower, the overhead costs will be greater, and, with the new ability of the electorate to repeal or reduce taxes, assessments, fees, and charges by initiative, there will be less certainty of a continuous revenue stream.

This paper has been extensively revised to reflect the changes made by Proposition 218. The new discussions note where there are uncertainties or ambiguities in the language of the measure. Existing statutes which appear to conflict with the provisions of Proposition 218 are also noted where possible. For the reader's convenience, the full text of Proposition 218 can be found in the Appendix.

Legislation intended to clarify Proposition 218 is expected to be introduced in 1997. And, as time passes, the courts will undoubtedly be called upon to interpret Proposition 218's intricacies. When new legislation or legal interpretations become available, we will update this paper.

At this time, the best single analysis of Proposition 218 and its impacts is *Understanding Proposition 218* written by the California Legislative Analyst's Office. Interested readers may obtain a copy from the Legislative Analyst at 925 L Street, Suite 1000, Sacramento, CA 95814 (916/445-6442) or from the Legislative Analyst's internet site at: http://www.lao.ca.gov. Additional analyses are listed in the Bibliography.

Ensuring that new development will be provided with adequate infrastructure and services is a primary consideration of local government. *A Planner's Guide to Financing Public Improvements* describes current statutory financing options available to California communities. Its primary purpose is to provide city and county planners with a general discussion of methods of public works financing that do not rely on state funds.

A Planner's Guide to Financing Public Improvements is only an introduction to the subject of local government finance. It is not intended to be a detailed text on any of these financing alternatives and is not an endorsement of any particular method.

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Chapter I
General Taxes

A general tax is "any tax imposed for general governmental purposes." (Section 1, Article XIII C, California Constitution). This does not include any tax imposed for specific purposes which is placed into a general fund (now defined as a "special tax" pursuant to Proposition 218). This clearly means that a special purpose agency such as a transportation authority can no longer impose general taxes, but instead is limited to special taxes requiring two-thirds majority voter approval.

The power to tax is not inherent. It "comes from the Legislature through its enactment of general laws which enable the local governing body to collect the taxes specified in those general laws" (*California Building Industry Association v. Newhall School District, etc. et al.* (1988) 206 Cal.App.3d 212). The ability of the Legislature to authorize local taxes is in turn limited by the State Constitution. Charter cities are an exception to this rule; their charters give them the power to levy taxes, as limited by the State Constitution.

Proposition 13 placed a limit on the revenues that cities, counties, and special districts could raise from ad valorem property taxes. In the years following its passage, local governments turned to alternative methods of taxation to recoup the reduction in revenues. Cities rediscovered business license taxes (Government Code section 37101), transient occupancy taxes (Rev. and Taxation Code section 7280), and utility user taxes to replace reduced general revenues. Counties, pursuant to SB 2557 (Chapter 466, Stats. 1990), have similar powers. In the following section on utility user taxes, references to "city" should be construed to mean city or county.

Before proposing any new or increased general tax, and prior to the public hearing at which the proposed tax is to be considered, the legislative body must conduct at least one public meeting at which testimony regarding the proposal will be allowed. Public notice of the meeting and the hearing must be provided, at the same time and in the same document, at least 45 days in advance of the hearing. Information contained in the notice must include the amount or rate of the tax, the activity to be taxed, the estimated annual revenue resulting from the tax, the method and frequency of collection, the dates, times, and locations of public meeting and hearing, and the name and number of a contact person within the agency proposing the tax or tax increase. The joint notice of the meeting and hearing must be published for three weeks in a newspaper of general circulation and mailed directly to those who have requested notice. There must be at least ten days advance notice of the public meeting, and the public hearing shall not be held less than seven days after the meeting. (Government Code section 54954.6)

Proposition 62

In 1986, California voters approved Proposition 62, an initiative measure aimed at closing the *Farrell* loophole (see Government Code section 53720 et seq.). The drafters of Proposition 62 intended that all proposed general taxes be subjected to a vote. Under its provisions, the local city council or board of supervisors, by 2/3 vote of its members at a public hearing, may place a general tax proposal on the jurisdiction-wide ballot. Approval of the tax requires affirmation by a simple majority of the electorate. The provisions of Proposition 62 apply retroactively to all general taxes adopted after July 31, 1985. Local jurisdictions were given until November 15, 1988 to gain voter approval of taxes levied during this "window period" (Government Code section 53727(b)).

From its inception, Proposition 62 has been a source of controversy. Prior to its adoption, the State Legislative Analyst and a southern California superior court each concluded that because it is a statutory (rather than constitutional) enactment, Proposition 62 does not apply to charter cities (which obtain their taxing powers from the State Constitution rather than from statute) to the extent that it contradicts the city charter.

Various Court of Appeal decisions after passage of Proposition 62 held that the measure unconstitutionally limited the ability of cities and counties to levy general taxes (*City of Westminster et al. v. County of Orange et al.* (1988) 204 Cal.App.3rd 623; *City of*

Woodlake v. Logan (1991) 230 Cal.App.3rd 1058). However, in 1995 the constitutionality of Proposition 62 was vigorously affirmed by the 5-2 opinion of the California Supreme Court in *Santa Clara County Local Transportation Authority v. Guardino (Howard Jarvis Taxpayers Assoc.)* 11 Cal.4th 220. Although the facts of this case relate primarily to the "special tax" provisions of Proposition 62, the Court was clear in its support for the measure's applicability to general taxes as well. The Court majority specifically disapproved the interpretation set forth in the *City of Woodlake* decision.

Proposition 218 has enshrined the Court's direction in *Guardino*. In cities, counties, and charter cities, general taxes require electoral approval.

Proposition 218

In November 1996, voters enacted Proposition 218, a Constitutional amendment intended to close the so-called Proposition 13 loopholes relative to excise taxes, benefit assessments, and fees, and to settle arguments over the applicability of Proposition 62, the voting requirement for general taxes. Proposition 218 added Articles XIII C and XIII D to the California Constitution. Pursuant to section 1 of Proposition 218, it is to be known as the "Right to Vote on Taxes Act." Proposition 218 both controls how general taxes are levied and requires certain previously levied general taxes to be ratified by voters.

Proposition 218 reduces all taxes to either general taxes or special taxes. It defines a general tax as "any tax imposed for general governmental purposes." A special tax is "any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." No special district (the definition of which includes school districts) may impose a general tax. By virtue of their specific purpose, taxes imposed by a special district are defined as special taxes. Charter cities, who had successfully argued that the statutory initiative Proposition 62 did not require them to submit general taxes to popular vote, now lose that argument to Proposition 218's constitutional amendment.

No local general tax may be imposed, extended, or increased until it has been submitted to and approved by a majority of the voters in the jurisdiction. Tax proposals can only be considered at scheduled general elections, unless the governing body of the city, county, or special district unanimously votes to place the question on the ballot at a special election.

Proposition 218 requires that any general tax imposed, extended, or increased since January 1, 1995 without benefit of voter approval must be placed on the ballot and ratified by November 5, 1998. This includes general taxes imposed by charter cities. Local jurisdictions must cease imposing any such tax that is not ratified by that date. In addition, Proposition 218 empowers voters within the jurisdiction to reduce or repeal any tax by initiative.

County Sales Tax Legislation

Counties, especially rural counties with their relatively limited tax base, have claimed increasing distress over a lack of both general and transportation funding. For a variety of reasons, such as population growth, new state-mandated local programs, and increased crime, a few counties have approched insolvancy in the late 1980's. Tehama and Shasta Counties, for example, have cut back services such as sheriff's patrols, libraries, and road maintenance in an effort to stretch limited funds.

In an attempt to assist counties, two pieces of state legislation were enacted in 1987 which allow counties to increase their sales tax to finance transportation improvements or general expenditures. At the same time, the maximum allowable sales tax rate was increased.

Based on Proposition 218, any sales tax increase imposed for a specific purpose (such as transportation facilities), or by a single-purpose authority (such as a county transportation authority) is a special tax requiring approval by two-thirds of the electorate.

Revenue and Taxation Code section 7285 provides that any county may levy a sales tax increase to pay for general expenditures. This increase may be either 1/4 cent or 1/2 cent per dollar. The board of supervisors must approve the proposed increase by 2/3 vote before placing it on the countywide ballot. The tax must then be affirmed by a simple majority of the voters taking part in that election. The proceeds of the additional sales tax may be used for any government purpose, including capital improvements, salaries, maintenance, and equipment purchases.

Excise Taxes

> *"Although the California Constitution does not expressly prohibit multiple taxation, the… provisions of Section 1 of Article XIII of the California Constitution, requiring that all property shall be taxed in proportion to its value, have been construed in a number of [court] decisions to prohibit*

Summary of Proposition 218's Major Points

- Proposition 218 is a Constitutional amendment. It supersedes any conflicting statutory law.
- Proposition 218 applies to all local government agencies, including charter cities. It does not apply to state agencies.

General and Special Taxes (Article XIII C, California Constitution)

- No general tax may be imposed, extended, or increased without first being approved by a majority of the jurisdiction's voters. A general tax must be considered at a general election. Any other scheduling of the vote requires unanimous approval of the agency's governing board.
- All taxes imposed by any local government are deemed to be either general taxes or special taxes. "Special tax" includes any tax imposed for specific purposes which is placed into a general fund. Special districts can only impose special taxes, not general taxes.
- Any general tax imposed on or after January 1, 1995 which was not subjected to voter approval must be placed before the voters for ratification by November 5, 1998. Any tax not ratified by the voters is repealed.
- General and special taxes can be reduced or repealed through the initiative process.

Assessments and Fees (Article XIII D, California Constitution)

- Existing laws relating to development impact fees are not affected by Proposition 218.
- Benefit assessments and "property related fees and charges" cannot be imposed without prior voter approval. Property owners within the area subject to a proposed benefit assessment must be mailed ballots, a public hearing must be held, and affirmative ballots must be received from a weighted majority of the property owners before a benefit assessment can be imposed. No property related fee or charge may be imposed until the fee or charge is submitted to and approved by a majority of the affected property owners or, alternatively, two-thirds of the residents of the affected area.
- The definition of the "special benefit" for which an assessment may be levied is "a particular and distinct benefit over and above general benefits conferred on real property… or to the public at large." General enhancement of property value does not constitute a special benefit.
- Assessments must be proportional to the particular special benefit conferred on each affected parcel. Only special benefits are assessable; any general benefit conferred on parcels must be identified and excluded from the assessment. Assessments must be imposed on benefiting local, state, and federal government property.
- Except for assessments securing bonded indebtedness, assessments previously approved by voters, and assessments financing capital costs, operations, or maintenance of sidewalks, streets, sewers, water, flood control, drainage systems, or vector control, assessments existing as of November 6, 1996 must comply with Proposition 218 by July 1, 1997 or be repealed.
- "Fee or charge" is defined as any levy other than an ad valorem tax, a special tax, or an assessment imposed by an agency upon a parcel or upon a person as an incident of property ownership. This is to include user fees and fees for property related services.
- No fee or charge may be imposed for a service that is not used by or immediately available to the property owner. So called "standby charges" are now classified as assessments.
- No fee or charge may be imposed for general governmental services such as police, fire, ambulance, or library services where the service is substantially as available to the public-at-large as it is to the property owners being charged.
- Fees and charges cannot exceed the proportional cost of the service attributable to the parcel. Further, revenues from the fee or charge cannot exceed the funds required to provide the property related service.
- Fees, charges, and assessments can be reduced or repealed through the initiative process.

the multiple taxation of ***property*** *(citations). On the other hand, it has been held that there is no similar constitutional prohibition against the levy of multiple* ***excise*** *taxes (citations)."*

Opinion #19078 of the
California Legislative Counsel

In the words of the U.S. Supreme Court, an excise tax is "a tax imposed upon a single power over property incidental to ownership" (*Bromley v. McCaughn* (1929) 280 U.S. 124). It is not a property tax. Instead, it is a tax levied on one of the incidents of land ownership; not on the land itself nor on land ownership per se.

An excise tax must be reasonably based upon a rational governmental purpose, such as raising general revenues to pay for public improvements necessitated by new development. Accordingly, it should not be imposed on those who either are not exercising the privilege being taxed or do not receive some benefit from the improvements or services being financed by the tax. At the same time, since it is being imposed on a single activity or privilege of ownership, an excise tax must be collected from the person involved in that activity or privilege (not necessarily the property owner). For example, an excise tax on residential construction is properly levied on the builder.

Proposition 218 characterizes all taxes as either general taxes or special taxes. Since the proceeds of excise taxes must be placed into the general fund to avoid characterization as a special tax, they would clearly seem to be subject to the voting requirements established for general taxes. However, things are not that easy. The language of Proposition 218 and the statements by its authors which blur the lines between taxes, assessments, and fees may be interpreted in ways which could profoundly limit the use of excise taxes. The following interpretations are purely speculative, and are intended primarily to illustrate the ambiguity of Proposition 218 in this area.

Some excise taxes may be subject to the proportionality and voting requirements applicable to fees and charges. Proposition 218 defines a fee or charge as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service" (Section 2(e), Article XIII D, California Constitution). An excise tax is neither an ad valorem tax, special tax, nor assessment. Therefore, perhaps an excise tax imposed upon developers as a condition of issuance of a building permit (such as that previously upheld in *Centex Real Estate Corp. v. City of Vallejo* (1993) 19 Cal.App.4th 1358) would be newly characterized as a fee or charge under Proposition 218. If this were the case, it would be limited strictly to the cost of the service or facility being financed and the levy imposed on each individual would be limited to the proportional cost of the service attributable to the parcel. Furthermore, imposing or increasing such a levy would require either simple majority approval of the owners of affected property or a two-thirds majority of area voters.

Another interpretation suggests that Proposition 218 may actually prohibit certain excise taxes. The reasoning is as follows: Proposition 218 provides that those taxes, assessments, fees or charges which may be assessed "upon any parcel of property or upon any person as an incident of property ownership" are limited to ad valorem property taxes, special taxes, assessments, and fees or charges (Section 3, Article XIII D, California Constitution). When an excise tax is physically collected through the property tax rolls, it might arguably be levied "upon [a] parcel of property." Since Proposition 218 excludes general taxes from its list of taxes which may be assessed in that situation, excise taxes would not be allowed.

Until these ambiguities are clarified, either by legislation or litigation, new excise taxes should be approached cautiously. On the assumption that they are general taxes, existing excise taxes imposed after January 1, 1995 should probably be put on the ballot for ratification by November 5, 1998.

Utility Users Tax

This is a general tax levied on utility customers. Cities are empowered to levy taxes upon the use of utilities (such as electricity, gas, telephone, and cable television) whether those utilities are provided by the city or by a public or private utility company. The utility company will bill its customers for this tax and collect the proceeds as part of its normal operations. The resulting revenues are then remitted to the city. Some cities, such as Culver City, impose a split-rate tax which levies different charges on residential and commercial users.

Courts have repeatedly upheld the concept of a utility users tax. In *Rivera v. City of Fresno* (1971) 6 Cal.3d 132, the California Supreme Court concluded that "cities may levy fees or taxes [on public utility users] solely for revenue purposes" and are not preempted by the state's regulation of public utilities. *Fenton v. City of Delano* (1984) 162 C.A.3d 400 held that utility users taxes did not require 2/3 voter approval since they are general taxes and not subject to the Constitutional provisions of Proposition 13.

Utility user taxes can no longer be imposed without popular approval. As a general tax, existing utility user taxes must be ratified by voters prior to November 6, 1998. New utility user taxes are subject to approval by a majority of voters in a scheduled general election.

New uncertainty over the future passage of utility taxes led two bond rating agencies to downgrade the City of San Diego's credit rating in December 1996. Although San Diego has traditionally avoided imposing a utility user tax, the fact that it could no longer do so without voter approval left Standard and Poors and Moody's Investment Services with concerns over the city's long-term ability to service debt on its general obligation bonds. The City of Sacramento's credit rating was also lowered in December 1996 in part for similar reasons.

Transient Occupancy Tax

(Revenue and Taxation Code section 7280)

The transient occupancy tax (TOT) is a popular type of excise tax available to both cities and counties. A TOT may be levied on the occupation of rooms in a hotel, inn, tourist home or house, motel, or other lodging where occupancy is to be 30 days or less. A TOT may also be levied on spaces in an RV park or campground (Chapter 1186, Stats. 1992). In concept, the revenues from a TOT can help offset general fund costs, such as police protection, street cleaning, and museums, that are engendered by the traveling public.

At this writing, over 340 cities and several counties levy transient occupancy taxes. Proposition 218 requires some existing TOTs (i.e., those enacted in 1995-96 without popular vote) to stand for a vote of ratification. Any new TOTs or increases must likewise be approved by voters.

Infrastructure Financing District

(Government Code section 53395 et seq.)

The Infrastructure Financing District (IFD) statute is a new way for a city or county to finance infrastructure improvements that are consistent with that city's or county's general plan. It taps the property tax through a variation on "tax increment financing," the financing method commonly employed by redevelopment agencies.

Tax increment financing relies upon diverting to the financing agency a portion of the property taxes being collected within the project area. Put very simply the diversion works like this: when a financing district is formed, the amount of taxes being collected is noted; any subsequent increase in revenues beyond this base amount is the tax increment and is set aside for the exclusive use of the financing agency.

The IFD is not a new kind of redevelopment agency. For example, when redevelopment is involved, the tax increment can include those taxes that normally would have gone to other taxing entities such as school districts and the county. Conflicts often arise between the redevelopment agency and the affected taxing entities over the loss of taxes by those agencies. This cannot happen in a IFD. IFD law provides that each of the other taxing agencies must grant its approval before any of its portion of the increment can be collected by the IFD. In no case can a school district dedicate any of its portion of the increment to the IFD.

Second, an IFD has no power of eminent domain. Unlike a redevelopment agency, it cannot condemn property.

Third, an IFD cannot be established within a redevelopment area. The two financing mechanisms are self-exclusive.

Fourth, an IFD should be established only in areas that are substantially undeveloped. Redevelopment, on the other hand, occurs in largely developed areas that are "blighted."

Fifth, 2/3 majority approval is required of the registered voters, or in some cases the property owners, within the proposed district in order to create an IFD. The redevelopment procedure contains no popular voting requirement.

An IFD may finance the purchase, construction, expansion, improvement, or rehabilitation of any real or other tangible property with an estimated useful life of 15 years or longer. Facilities which are purchased must be already constructed at the time of purchase.

This legislation attempts to ensure that IFD developments will not have a deleterious effect on low- and moderate-income housing supplies. IFDs are obligated to provide low- and moderate-income housing when they are used to construct housing and when, as a result of their activities, existing housing is demolished or removed (Government Code section 53395.5).

Facilities eligible for financing through an IFD include, but are not limited to the following (Government Code section 53395.3):

- highway interchanges, bridges, arterial streets, and transit facilities
- sewage treatment plants and interceptor lines
- water treatment facilities for urban use
- flood control structures

- child care facilities
- libraries
- parks, recreational facilities, and open space
- solid waste transfer and disposal facilities

Facilities financed by an IFD must be of community-wide significance and provide significant benefits to an area larger than the area of the district.

Such facilities need not be located within the boundaries of the IFD. Facilities financed through an IFD may not replace existing facilities or services. They can, however, supplement existing facilities and services as necessary to serve new development.

The IFD law creates a complex procedure for establishment of an IFD (Government Code section 53395.10 et seq.). Briefly, it involves adoption of a "resolution of intention" by the city or county proposing to create the district; preparation of a detailed financing plan that is sent to affected property owners and taxing entities; a public hearing for the purpose of receiving comments from the public and affected taxing agencies; and a voting procedure similar to that used under the Mello-Roos Community Facilities Act. If the IFD proposes to issue bonds, it must obtain the approval of a majority of the legislative body of the city or county creating the district and of 2/3 of the district electorate.

Chapter II
Special Taxes

> *"Special tax" means any tax imposed for specific purposes, including a tax imposed for special purposes, which is placed into a general fund.*
>
> Subdivision (d), Section 1, Article XIII C of the California Constitution

> *All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.*
>
> Subdivision (a), Section 2, Article XIII C of the California Constitution

Proposition 218 has clarified that a special tax may take either of two forms: any tax imposed for specific purpose whose proceeds are held in a separate account for that purpose, or any tax imposed by a special purpose district or agency, including a tax whose proceeds are placed in the general fund of that district or agency. This distinction reflects the evolving judicial view of special taxes set forth by the California Supreme Court's 1991 Rider (*Rider v. County of San Diego* 1 Cal.4th 1) and 1995 Guardino (*Santa Clara County Local Transportation Authority v. Guardino* 11 Cal.4th 220) decisions. In *Rider*, the Court overturned a sales tax being levied by San Diego County to fund a special authority created to finance construction of justice facilities, holding that it was a special tax subject to a two-thirds majority vote. The *Guardino* decision overturned a Santa Clara County sales tax on similar grounds (the tax was administered by a special authority and intended to finance transportation improvements, but did not receive two-thirds approval).

Under Proposition 218, a special tax is subject to reduction or repeal by popular initiative. An initiative campaign may be launched at any time after approval of the special tax.

Because it is a tax, not a fee or assessment, the amount of the special tax is not limited to the relative benefit it provides to taxpayers. Special taxes cannot be imposed on an ad valorem (property value) basis. They must be levied uniformly on all eligible properties or taxpayers. Typically, they are "per parcel" taxes apportioned according to the square footage of the parcel or on a flat charge. The proceeds of a special tax count toward a local government's Gann appropriations limit.

The *Guardino* decision affirmed that Proposition 62's definition of "district" (Government Code Section 53720) includes districts which have no property tax power. This specifically set aside the California Supreme Court's 1982 decision in *Los Angeles County Transportation Commission v. Richmond* 31 Cal.3d 197 which limited the application of Proposition 13 to only those special districts with property tax powers. Through *Guardino*, the Supreme Court has declared that Proposition 62 closes the *Richmond* "loophole" for districts created after Proposition 13.

The California Constitution does not, in itself, enable local governments to levy special taxes; that authorization must be specifically granted by the State Legislature (*California Building Industry Association v. Newhall School District, etc. et al.* (1988) 206 Cal.App.3d 212). Government Code sections 50075 et seq. provide much of the enabling language necessary for imposing special taxes. A city, county or special district (now including a school district) contemplating a special tax levy must hold a noticed public hearing and adopt an ordinance or resolution prior to placing the tax on the ballot. The ordinance or resolution must specify the purpose of the tax, the rate at which it will be imposed, the method of collection, and the date of the election to approve the tax levy. Approval by a 2/3 vote of the city, county or district electorate is necessary for adoption.

Experience has shown the 2/3 vote requirement to be a major hurdle for attempts at raising local special taxes. A Marin County special tax intended to help finance land acquisitions by its popular open space district and a proposed San Diego County special tax for libraries both failed to receive the required supermajority in the November 1996 general election.

Nonetheless, special taxes have been imposed for a variety of uses. For example, some of the special taxes approved in 1997 include: library, fire safety, and paramedic services in Los Angeles County; paramedic services in Mendocino County (Coast Life Support District); and fire protection in Marin County (Tamalpais Valley FPD).

Special taxes for public libraries

Government Code sections 53717-53717.6 enables any city, county or library district to impose a special tax within their jurisdiction for the purpose of funding public library facilities and services. These taxes may be applied on a uniform basis to real property or on the basis of benefit, cost of providing services or other reasonable basis (Government Code section 53717.3).

Special taxes for fire or police protection

Government Code section 53978 authorizes any local agency which provides fire protection, fire prevention services or police protection (either directly or by contract with another agency) to levy special taxes for fire protection/prevention and police protection. Prior to placing the tax proposal on the ballot, the agency must adopt an ordinance describing the rate of taxation and maximum tax levy. When a local agency determines the amount of tax annually, it must not exceed the maximum amount established by the original ordinance. The taxes must be levied on a parcel, class of improvement to property or use of property basis and may be varied to each parcel, improvement or use of property based on the degree of availability of fire or police services in the affected area.

The local agency need not impose this as a jurisdiction-wide special tax. It can establish particular areas or zones which will be assessed taxes to pay for services in those areas. The graduated application of this tax based on zoning classifications, where a flat tax rate was applied on all parcels within each zone regardless of size or other characteristics, was upheld in a 1986 California Supreme Court case (*Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481). The court distinguished this method of calculating the tax burden from an ad valorem tax.

This tax may be used to pay for “obtaining, furnishing, and maintaining fire suppression and police protection equipment or apparatus or either such service” (Government Code section 53978(b)). It may also be used to pay salaries and benefits for firefighting or police protection personnel and for related expenses. Like other special taxes, a police/fire protection tax is dedicated to the use for which it was levied. It is subject to approval by two-thirds of the voters within the jurisdiction or zone proposed for taxation.

County Sales Tax Legislation

As discussed in Chapter 1, statute authorizes a county to levy a countywide sales tax increase, the proceeds of which are to be used within its boundaries. Two of these statutes allow a county to establish an authority which will administer the proceeds of the sales tax for specific purposes. Although the Legislature intended these to be characterized as general taxes subject to a simple majority vote, first the *Guardino* decision and now Proposition 218 make it very clear that the proceeds of this sales tax are "special taxes" and may only be imposed upon two-thirds approval.

The Local Transportation Authority and Improvement Act (Public Utilities Code sections 18000 et seq.) enables counties to impose an additional one-percent (or less) sales tax for a period of up to 20 years. The revenues generated by this tax are used to finance specific transportation projects either directly or through bonded indebtedness.

Pursuant to this Act, the county board of supervisors, by 2/3 vote, can create a local transportation authority for the purpose of administering the proceeds of a sales tax increase and call a popular election on the proposed tax increase. The membership of the transportation authority and the proposed expenditure plan must be approved by a majority of the cities having a majority of the city population in the county prior to placing the measure on the countywide ballot. The expenditure plan must be included in the official voters’ pamphlets. Pursuant to Proposition 218, passage of the tax requires affirmation by a two-thirds majority of the voters taking part in that election.

Alternately, the county board of supervisors may establish an authority which would be empowered to propose a 1/4 or 1/2 percent sales tax increase for specific purposes (Revenue and Taxation Code section 7285.5). The authority must follow the same procedure that applies to the levy of a special tax. In addition, the authority must adopt an expenditure plan describing the specific projects on which the new tax revenues will be spent.

The Mello-Roos Act

The 1982 Mello-Roos Community Facilities Act (Government Code Sections 53311 et seq.) enables cities, counties, special districts, and school districts to establish community facilities districts (CFDs) and to levy special taxes to fund a wide variety of facilities and services. The proceeds of a Mello-Roos tax can be used for direct funding and, in the case of capital facilities, to pay off bonds. Mello-Roos financing has similarities to special taxes and special assessments and, in some situations, it has advantages over both.

The procedure for establishing a Mello-Roos district is not simple. The following is a general example of how it is done.

Proceedings may be started:

(1) by the local legislative body acting on its own initiative;

(2) at the request of at least two members of the body; or,

(3) when the body receives a petition signed by either 10% of the registered voters residing within the proposed district or by the owners of 10% of the land within the proposed district.

Within 90 days of the initiation of proceedings, the legislative body must adopt a resolution of intention which:

(1) describes the boundaries of the proposed district;

(2) states the name of the proposed CFD;

(3) describes the types of facilities and services to be provided or purchased within the district and any incidental expenses;

(4) states that a special tax, secured by recordation of a continuing lien on nonexempt property, will be levied annually. It must also specify the rate, method of apportionment, and manner of collection of the special tax in a way which will allow each landowner to estimate their tax liability;

(5) fixes a time and place for a public hearing on the district formation;

(6) describes any adjustment in property taxation necessary to pay prior indebtedness; and

(7) describes the proposed voting procedure.

(Government Code section 53321)

By the time of the public hearing, the agency must have prepared and made available a report explaining the proposed purpose of the district and containing an estimate of costs. (Government Code section 53321.5) Advance notice of the hearing must be published in a newspaper of general circulation and a notice mailed to each landowner and registered voter within the proposed district. The notice must contain the text of the resolution of intention, the time and place of the hearing, and a description of the protest procedure. Written or oral protests against creation of the district, the proposed district boundaries or the particular facilities or services to be funded can be filed prior to or at the public hearing. Proceedings must be abandoned for a period of one year if protests are received from either:

(1) 50% or more of the registered voters residing within the proposed district or six of such voters, whichever is more; or,

(2) the owners of one-half or more of the land in the district.

If the protests relate to particular boundaries, facilities, services, or taxes, the legislative body may revise the proposed district to accomodate those concerns. If, upon conclusion of the hearing (and any continuances thereto), the legislative body decides to create the CFD it must adopt a resolution of formation.

The next step is an election to authorize levying the specified tax. If necessary, this election may be combined with an election to raise the local Gann limit. The required election procedure varies depending upon the number of registered voters residing within the boundaries of the CFD. When there are 12 or more registered voters, the election is held among the registered voters residing within the CFD. If there are fewer than 12 voters, then a vote is held among landowners, with each acre of land or portion of an acre counting as one vote. Landowner elections may be conducted by mail, as was done by the Rocklin Unified School District in creating a Mello-Roos district covering 4454 acres of rural land slated for residential development. In both such circumstances, approval requires a two-thirds affirmative vote

As originally enacted, the Mello-Roos Act did not provide notice to prospective property buyers of their special tax obligations under a CFD. This shortcoming has been largely redressed by requiring: (1) clearer disclosure of the potential special tax burden at the time of a CFD election; (2) designation by the legislative body levying the special tax of an agency to respond to public inquiries about current and future special tax levies; and (3) full disclosure of the tax by the agency and sellers to prospective property buyers.

The Mello-Roos Act is designed to be flexible. Interestingly, the land included within the district boundaries need not be contiguous. As time goes by, additional area may be added to the Mello-Roos district through much the same manner as the district was originally created (Government Code section 53339 et seq.). A CFD can be broken into improvement districts that, subject to their own elections, can contribute to an overall project (Government Code section 53350). In addition, the facilities being funded need not be physically located within the boundaries of the Mello-Roos district (Government Code section 53313.5). CFD formation proceedings may be initiated in an area proposed for annexation to a city when that city has filed a resolution of intention for annexation with the

Local Agency Formation Commission. Actual formation will be contingent upon approval of the proposed annexation (Government Code section 53316). Furthermore, the legislative bodies of two or more local agencies can enter into a joint community facilities agreement or a joint powers agreement in order to finance cooperative improvements or services. Such agreements may also include state or federal agencies.

Upon formation of the CFD and levy of the special tax, a special tax lien will be recorded against all eligible properties in the district (Government Code section 53340). This and the other disclosure requirements noted above ensure that purchasers of taxable properties will have constructive notice of the existence of the special tax.

The Mello-Roos Act is designed to make it as easy as possible to gain passage of the special tax within the constraints of a two-thirds vote. Because the CFD boundaries may be discontiguous, those areas which will not support the tax can be avoided. In landowner elections, the ballots may be distributed in any manner approved by the registrar of voters, including at the formation hearing.

A Mello-Roos tax is not a special assessment, so there is no requirement that the tax be apportioned on the basis of property benefit. Nonetheless, this can be done at local option (Government Code section 53325.3). When so apportioned, it may possibly be subject to the assessment requirements of Proposition 218. The tax can be structured so that it varies depending upon the zoning or development intensity of the property being assessed. Apportionment cannot, however, be done on an ad valorem basis.

A Mello-Roos tax can be used to finance the purchase, construction, expansion, improvement or rehabilitation of real property with a useful life of five years or more (Government Code section 53313.5). It can pay for other capital facilities including, but not limited to:

- local park, recreation, and open-space facilities (Government Code section 53313.5(a));
- parkway facilities (Government Code section 53313.5(a));
- elementary and secondary school sites and structures that meet the building area and cost standards of the State Allocation Board (Government Code section 53313.3(b));
- fire stations;
- highway interchanges;
- water and sewer systems;
- libraries (Government Code section 53313.5(c));
- child care facilities (Government Code section 53313.5(d));
- the undergrounding of utilities;
- acquisition, improvement, rehabilitation, or maintenance of public or private property for the purpose of removing or cleaning up hazardous materials (section 53313.5);
- work found necessary to bring public or private buildings into compliance with seismic safety standards or regulations (Government Code section 53313.5 (h));
- any governmental facilities which the legislative body creating the CFD is authorized by law to contribute revenue to, own, construct, or operate (Government Code section 53313.5 (g));
- acquisition, improvement rehabilitation, or maintenance of real or other tangible property, whether publicly or privately owned, for the purpose of removal or remediation of any hazardous substance (Government Code sections 53314.6 and 53313.8); and,
- the repair and abatement of damage caused to privately owned buildings and structures by soil deterioration, provided (a) the vote on the question of imposition of the special tax is unanimous, and (b) the work to be financed is certified as necessary by local building codes (Government Code section 53313.5).

There are certain limitations upon the use of Mello-Roos taxes for seismic safety improvements. First, only that work certified by local building officials as necessary to meet seismic safety regulations can be financed. Second, no dismantling of an existing building or construction of any new or substantially new building can be financed. Third, if improvements to private buildings are to be financed, the CFD must have unanimous approval of the affected land owners. Fourth, work on private buildings is limited to those that need seismic safety retrofitting or that were destroyed by the October 17, 1989 Loma Prieta earthquake.

In addition, within the counties declared disaster areas as a result of the Loma Prieta quake, a CFD may be formed to pay for any work needed to rebuild, repair, or replace any public or private building damaged or destroyed in that temblor. Work financed under this provision of Government Code section 53313.5 (h) is limited to those buildings which have been specifically identified in the resolution of intention to establish the CFD. The resolution must have been adopted before October 17, 1994.

A Mello-Roos tax can pay for the planning and design work directly related to the improvements being financed. Mello-Roos proceeds may also be put toward eliminating fixed special assessment liens or repaying any indebtedness secured by a tax, fee, charge or assessment levied within the CFD. (Government Code section 53313.5)

A Mello-Roos CFD may also fund the following services on a pay-as-you-go basis:

- police protection (including the provision of jails and detention facilities);
- fire protection and suppression;
- ambulance and paramedics;
- flood protection;
- recreation program and library services and additional funds for the operation and maintenance of parks, parkways, open space, museums, and cultural facilities (this final service cannot be approved through a landowner election); and,
- removal or remedial action for cleanup of any hazardous substance. (Government Code section 53313).

A CFD tax approved by landowners' vote (i.e. when there are less than 12 registered voters in the proposed district) can only finance the above services to the extent that they are in addition to services that were already being provided to the area before the district was formed (Government Code section 53313).

Bonds may be issued to finance infrastructure (but not services) under the Mello-Roos Act. Debt service is paid from the proceeds of the district. However, in order to avoid defaults, the legislative body must determine before the sale of bonds that the value of the real property that would be subject to the special tax will be at least three times the principal amount of the bonds to be sold and the principal amount of all other outstanding bonds within the CFD boundaries secured by Mello-Roos special taxes and special assessments. This rule and the exceptions to it may be found in Government Code section 53345.8. Refer to Government Code section 53345 for the procedure for issuing bonds.

Issuing bonds secured by the proceeds of the CFD has become quite popular. This provides an immediate source of cash for CFD projects that can then be repaid over time.

Some of the types of projects that have been funded through Mello-Roos bonds include:

- fire stations (Corona, Portola, and Riverside County);
- flood control/drainage improvements (Ontario, Fontana, Rancho Cucamonga, Oceanside, and others);
- K-12 school facilities (Chino Unified School District, Vallejo Unified School District, Corona-Norco Unified School District, Mountain View School District, and others);
- multiple public works in "planned communities" (Orange County, Riverside County, San Bernardino County, Thousand Oaks, Vallejo, and others);
- public park improvements (Tiburon and Riverside County);
- recreation and sports facilities (Highlands Recreation District of San Mateo County)
- road construction, bridges, and highways (Banning, Orange County, Poway, Riverside, Rocklin, Yorba Linda, and many others);
- solid waste recovery (Fontana); and,
- water supply/wastewater disposal (Corona, Los Angeles County, Riverside County, Santa Ana Mountains County Water District, and others).

Mello-Roos financing is the basis for a novel program to preserve open space and farmland near Fairfield in Solano County. The Solano County Open Space and Farmland Foundation administers the proceeds from Mello-Roos CFDs established by the city of Fairfield in conjunction with three large development projects. Once these projects are completed and a constant flow of income made available, the foundation will sell Mello-Roos bonds secured by the special taxes. The $3.5 million that is estimated to be raised will be used to purchase farmlands in the Suisun Valley and open space near Fairfield.

As with all special taxes, Mello-Roos taxes are subject to reduction or repeal by initiative. Proposition 218 does not specify whether the qualifying signatures for an initiative must be gathered jurisdiction-wide and the question put to jurisdiction-wide vote, or whether the initiative is limited to that portion of the jurisdiction within the boundaries of the CFD.

Chapter III
Special Assessments

The effects of Proposition 218 will be felt nowhere more intensely than in the area of special assessments. The initiative reverses many long-standing procedures and court interpretations relating to the use and levying of special assessments. By design, Proposition 218 restricts the uses to which assessments may be put, limits the property owners who may be charged assessments, increases local agency accountability, and prohibits assessments that lack the support of local property owners. Perhaps unwittingly, Proposition 218 may also increase the cost to local agencies of financing bonded indebtedness through assessments and impose upon local agencies substantial new administrative costs. As noted before, Proposition 218 is not written as clearly as it might have been. Given that clarification will only come through legislation and litigation, its full impact will not be known for some time.

Because it is a Constitutional amendment, Proposition 218 supersedes all conflicting statutory laws. It applies to charter cities as well as counties, general law cities, and special districts. The assessment acts discussed in this chapter will have many provisions, particularly dealing with formation procedures and the scope of assessment power, which are no longer valid. We will note in the discussions of the individual assessment acts where, as of this writing, the acts appear to conflict with the provisions of Proposition 218.

Proposition 218

Proposition 218 establishes a strict definition of "special benefit." For the purposes of all assessment acts, special benefit means "a particular and distinct benefit over and above general benefits conferred on real property located in the district or the public at large. General enhancement of property value does not constitute 'special benefit.'" In a reversal of previous law, a local agency is prohibited by Proposition 218 from including the cost of any general benefit in the assessment apportioned to individual properties. Assessments are limited to those necessary to recover the cost of the special benefit provided the property. From a practical point of view, this will make open space and park assessments difficult to levy. It also complicates the process of setting assessments intended to finance public services, such as police, ambulance, and fire, and public buildings, such as libraries. The Chief Administrative Office of the County of Los Angeles, for example, has opined that Proposition 218 will require the county to rescind its library assessment and carefully reexamine the legality of its fire assessment.

In addition, assessments levied on individual parcels are limited to the "reasonable cost of the proportional special benefit conferred on that parcel."

Previously, assessments were seldom if ever levied on public property. Proposition 218 specifically requires assessments to be levied on public parcels within an assessment district, unless the agency which owns the parcel can "demonstrate by clear and convincing evidence" that its parcel will receive no special benefit.

Assessment District Formation Procedure

Proposition 218 establishes a common formation and ratification procedure for all special assessment districts as defined by Section 4, Article XIII D of the California Constitution. These requirements apply to all special assessments, to the exclusion of any conflicting laws. At this writing, the various assessment district acts have not been amended to remove these conflicts and to clarify ambiguities in the application of Proposition 218. The Legislature is expected to begin considering bills for this purpose in 1997.

All assessments must be supported by a detailed engineer's report prepared by a registered professional engineer. The report must contain: the total amount of money chargeable to the assessment district, the amount chargeable to each parcel in the district, the duration of the payments, the reason for the assessment, and the basis upon which the proposed assessment was calculated (Section 4(c), Article XIII D, California Constitution). Although not explicitly mandated by Proposition 218, the report should also include a description of the improvements or services to be financed through the special assessment, the proposed district boundaries, and a description of the special benefit which each parcel receives as a result of the assessment.

Prior to creating an assessment district, the city, county, or special district must hold a public hearing and receive approval from a majority of the affected property owners casting a ballot. All owners of property within the assessment district must be mailed a detailed notice of public hearing and a ballot with which to voice their approval or disapproval of the proposed district at least 45 days prior to the hearing (Section 4(e), Article XIII D, California Constitution). The notice must contain: the total amount of money chargeable to the assessment district, the amount chargeable to each parcel in the district, the duration of the payments, the reason for the assessment, the basis upon which the proposed assessment was calculated, and a summary of the ballot procedure, as well as the date, time, and location of the public hearing. The notice must also disclose that a majority protest will result in the assessment not being imposed.

At the hearing, the governing body of the agency must consider all protests to formation of the district. Assessment district proceedings must be abandoned if a majority of the ballots received by the conclusion of the hearing protest creation of the district. Ballots are to be weighted according to the proportional financial obligation of the affected property — the larger the financial obligation, the greater the weight that must be assigned to that property. Unlike previous law under many of the assessment district acts, the governing body cannot overrule the property owner vote. No other form of election is required. Once an assessment is created, it may be repealed or reduced by popular initiative.

A key practical question about the ballot process under Proposition 218 is who votes when a property is held in multiple ownership (or there are multiple renters who are directly liable for payment of the assessment) or when the property is owned by a public agency? This is not answered in the initiative and is expected to be the subject of legislation, litigation, or both in the coming year.

Agencies are going to have to work harder than ever to levy a new assessment or increase an existing one. They must clearly identify the special benefit being conferred to the parcels being assessed, excluding any identified general benefit. They must apportion the assessment on an individual basis to parcels within the district. Where an assessment is challenged in court, Proposition 218 specifies that the agency carries the burden of proof in showing that the property is receiving a special benefit and that the amount assessed is proportional to, and no greater than, the special benefits conferred. Most importantly, agencies will have to educate property owners about the advantages of the prospective assessment. The ballot process established by Proposition 218 favors those property owners who oppose the assessment (since they are generally the most motivated to return a ballot). Refer to the League of California Cities' "Proposition 218 Implementation Guide" for a discussion of the limits on public agencies' communications in elections.

Effective Date and Grandfathering

All of the above requirements took effect on November 6, 1996, so they apply to any new or increased assessments proposed after that date. The intent of the sponsors of the initiative is that existing assessments cease by July 1, 1997 unless ratified by the assessed property owners.

As of December 1996, a number of jurisdictions had already indicated that they will hold ratification elections for and, where necessary to limit assessments to special benefits, redraw the boundaries of existing assessment districts. For example, the City of San Mateo will revisit its downtown assessment for parking and street cleaning, Sacramento County will bring its Landscaping and Lighting Districts to a vote, and the City of San Diego will place 33 Landscaping and Lighting and 14 Business Improvement Districts on the ballot for ratification. Some jurisdictions have chosen to convert existing assessments to special taxes in order to avoid any challenge that they do not meet the definition of special benefit. These require the approval of 2/3 of the jurisdiction's voters.

There are exceptions to the application of Proposition 218. These apply to many of the assessments already in place as of November 5, 1996. The following existing assessments are not required to comply with Proposition 218 (although increases after November 6, 1996 may):

"(a) Any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems, and vector control...

"(b) Any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed….

"(c) Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States.

"(d) Any assessment which previously received majority voter approval from the voters voting in an election on the issue of the assessment." (Section 5, Article XIII D, California Constitution)

Although they are usually sent out with the property tax bill, special assessments are not property taxes. Unlike taxes (including special taxes), the sum of a special assessment cannot exceed the cost of the improvement or service it is financing. Furthermore, special assessments cannot be levied against those properties which do not directly benefit from the improvements being financed. Property that is outside the area receiving the specific improvements being financed cannot be charged a special assessment.

Ad valorem property taxes on the other hand, are levied on eligible real property based upon that property's assessed valuation, unrelated to the proportional benefits being received by that property. So called "special taxes" are levied for a specific purpose, but are similarly unrelated to the proportional benefit being received from the improvements being financed.

California statutes give local governments the authority to levy a number of special assessments for specific public improvements such as streets, storm drains, sewers, street lights, curbs and gutters, and landscaping. The legislative body of a city, county, or in some cases a special district (flood control district, fire protection district, etc.), may, by invoking the proper statute in the proper manner, create a special assessment district that defines both the area to benefit from the improvements and the properties that will pay for those improvements. Thereafter, each property within the district will be assessed a share of the cost of improvements that is proportional to the direct benefit it receives from those improvements.

Pursuant to California case law, a special assessment district is not considered a separate legal entity like a special district (*Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676). Most special assessment districts have no officers or governing board and are strictly financing mechanisms.

History

Special assessments have a long history of use. Nationwide, special assessments can be traced back to a 1691 levy for street and drain construction in New York City. In California, several of the major assessment acts date from the early part of the 20th Century. Until the Great Depression of the 1930's, special assessments were a major municipal financing tool. Economic conditions during the depression caused numerous landowner defaults on assessments which, in turn, made it difficult to pay off the bonds backed by the assessments, and public credit suffered. From that time until the passage of Proposition 13, special assessments were used sparingly as local governments came to rely largely upon property taxes for their income.

When Proposition 13 first took effect, it reduced local property tax revenues by over 50%. Special assessments gained immediate notice as a "new" source of funding. A quick comparison of the use of special assessments before and after Proposition 13 illustrates how assessments have grown in popularity. In the 1960's and mid-70's the volume of assessments is estimated to have been from $20-50 million per year. By 1985, the estimated annual volume of special assessments had climbed to more than $700 million.

There were several reasons for the popularity of special assessments. First, the California courts have held they are not ad valorem property taxes. As a result, special assessments are exempt from the taxation limits imposed by Proposition 13 (*Fresno County v. Malmstrom* (1979) 94 Cal.App.3d 974; *Solvang Municipal Improvement District v. Board of Supervisors* (1980) 112 Cal.App.3d 545; *County of Placer v. Corin* (1980) 113 Cal.App.3d 443). Second, they are not "special taxes" requiring two-thirds vote of the electorate prior to being imposed. In fact, prior to Proposition 218, special assessment districts were established by the city council or county board of supervisors and usually not subject to public vote. Third, the proceeds of a special assessment are not "proceeds of taxes" for purposes of the Gann Act (*City Council v. South* (1983) 146 Cal.App.3d 320). Accordingly, funds received from special assessments do not apply toward a jurisdiction's Gann Act spending limit.

Most of the special assessment acts also provide for the issuance of bonds. Bonds are, in effect, money that the local government is borrowing for the purpose of constructing the improvements authorized by the assessment district. These bonds are generally secured by the property within the district and the bonded indebtedness is repaid with the money generated by the assessments. Assessments are subject to reduction or repeal by popular initiative (Section 3, Article XIII C, California Constitution). Agencies securing bonded indebtedness with assessments created or increased after November 6, 1996 should disclose this fact to potential investors. Although the contract clause of the

U.S. Constitution would likely preclude an initiative from eliminating an assessment securing bonded indebtedness, the loss of other potential sources of funding through initiative (which would affect the overall financial health of the agency) may be a concern.

Landowners are given the opportunity to pay off the assessment immediately, otherwise, the assessments become liens against the property and landowners pay them off in installments. Typically, assessment bonds are sold to provide the capital needed to pay for immediate construction of the project and are secured by property liens.

Several of the most common types of special assessments are summarized in the following paragraphs. These summaries are general discussions of complex financing acts. Please refer to the statutes themselves for detailed information, particularly on the subject of district formation and hearing requirements. Note that several of these acts are only available for use by cities.

The Assessment Acts

Improvement Act of 1911

(Streets and Highways Code section 5000 et seq.)

The 1911 Act may be used by cities, counties, and "all corporations organized and existing for municipal purposes." Assessments under this Act may be used to fund a long list of improvements including:

- transportation systems (including acquisition, construction, maintenance, and operation costs related thereto);
- street paving and grading;
- sidewalks;
- parks;
- parkways;
- recreation areas (including necessary structures);
- sanitary sewers;
- drainage systems;
- street lighting;
- fire protection systems;
- flood protection;
- geologic hazard abatement or prevention;
- water supply systems;
- gas supply systems;
- retaining walls;
- ornamental vegetation;
- navigational facilities;
- land stabilization; and,
- other "necessary improvements" to the local agency's streets, property, and easements.

The 1911 Act may also be used to create a maintenance district to fund the maintenance and operation of sewer facilities and lighting systems.

Pursuant to this act, improvements must be completed before their total cost is assessed against the properties within the district. Contractors are, in effect, reimbursed for their work from the proceeds of the district. This aspect of the 1911 Act requires that sufficient funds be available for the project before it is begun and is a major drawback of the legislation. Total costs may include acquisition, construction, and incidentals (including engineering fees, attorney's fees, assessment and collection expenses, and cost of relocating utilities). The uncertainty that results from Proposition 218's voting requirements will probably discourage the future use of the 1911 Act.

Individual assessments constitute liens against specific parcels and are due within 30 days of confirmation. If assessments are not paid in full within this period, a bond in the amount due is issued to the installer of the improvements and assessments are collected from individual properties to pay off the bond. The property owner receives a separate bill indicating the assessment due. Bonds may also be issued under the Improvement Bond Act of 1915 even though the assessment repaying the bonds has been levied under the 1911 Act. Alternatively, for assessments of less than $150, the assessment may be collected on the tax roll upon which general taxes are collected.

Since the parcel being assessed is the only security for any bonds issued, accurately estimating the value of the property is very important. The feasibility of the project will hinge on the value of the property involved.

As of this writing, the public notice and assessment procedure under the Act conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile these differences in the statute.

Municipal Improvement Act of 1913

(Streets and Highways Code section 10000 et seq.)

The 1913 Act may be used by cities, counties, joint powers authorities, and certain special districts which are empowered to make any of the improvements authorized under the Act. It specifically authorizes the construction and maintenance of all the facilities authorized under the 1911 Act as well as the following:

- works and appliances for providing water service, electrical power, gas service, and lighting; and
- public transit facilities serving an area smaller than 3 square miles (including stations, structures, rolling stock, and land acquisition related thereto).

In addition, a municipality may enter into an agreement with a landowner to take over the operation and other activities of a sewer or water system owned by that landowner and create a 1913 Act assessment district for the purpose of reimbursing the landowner. Such an assessment district may also include other land that can be served by the system, upon the written consent of the other affected landowners.

Unlike the 1911 Act, the total cost of improvements is assessed against the benefited properties before the improvements are completed. An assessment constitutes a lien against a specific parcel and is due within 30 days of recording the notice of assessment. If the landowner chooses not to pay the assessment in full at that time, bonds in the amount of the unpaid assessment may be issued under the 1911 Improvement Act or the 1915 Improvement Bond Act. Landowners will then be assessed payments over time.

A number of amendments to the Act enacted in 1992 have expanded its use to include certain building repairs and upgrades that are necessary to the public safety. For example, assessments may now finance work or loans to bring public and private real property or buildings into compliance with seismic safety and fire code requirements (Chapters 1197 and 832, Statutes of 1992.) Work is limited to that certified as necessary by local building officials. Revenues must be dedicated to upgrades; they cannot be used to construct new buildings nor dismantle an existing building. In addition, no property or building may be included within the boundaries of a 1913 Act district established for these purposes without the consent of the property owner. Furthermore, when work is financed on residential rental units, the owner must offer a guarantee that the number of units in the building will not be reduced and rents will not be increased beyond an affordable level.

The 1913 Act can also be used to finance repairs to those particular private and public real properties or structures damaged by earthquake when located within a disaster area (as declared by the Governor) or an area where the Governor has proclaimed a state of emergency as a result of earthquake damage (Chapter 1197, Statutes of 1992). The kinds of work which may be financed include reconstruction, repair, shoring up, and replacement. A jurisdiction has seven years from the time a disaster area is declared or a state of emergency is proclaimed to establish a district under this statute.

As of this writing, the public notice and assessment procedure under the Act conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative must be followed. Legislation is needed to reconcile the Act with Proposition 218.

Improvement Bond Act of 1915

(Streets and Highways Code section 8500 et seq.)

This legislation does not authorize assessments. Instead, it provides a vehicle for issuing assessment bonds (including variable interest bonds) for assessments levied under the 1911 and 1913 Acts as well as a number of other benefit assessment statutes. Under this legislation, the local legislative body may also issue “bond anticipation notes” prior to actual bond sale - in effect borrowing money against the assessment bonds being proposed for sale. The 1915 Act is available to cities, counties, public districts, and public agencies.

After assessments have been levied and property owners given the opportunity to pay them off in cash, the local government will issue bonds for the total amount of unpaid assessments. Assessments collected to pay off 1915 Act bonds appear on the regular tax bill and are collected in the same manner as property taxes.

Park and Playground Act of 1909

(Government Code section 38000 et seq.)

The Park and Playground Act is a method for cities to finance public park, urban open-space land, playground, and library facilities. Pursuant to a 1974 revision, the act incorporates the procedures and powers of the Improvement Act of 1911, the Municipal Improvement Act of 1913, and the Improvement Act of 1915 to finance improvements. In addition to the power to levy assessments and issue bonds, the act provides that the city council may condemn land for improvements.

Tree Planting Act of 1931

(Streets and Highways Code section 22000 et seq.)

Pursuant to this act, cities may levy assessments to fund the planting, maintenance or removal of trees and shrubs along city streets and to pay employees to accomplish this work. Assessments for maintenance are limited to a period of 5 years.

These assessments are apportioned on the basis of street frontage. Work is to be administered by the city parks department or other agency as appointed by the city council.

As of this writing, the public notice and assessment procedure under the Act conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218. A city contemplating the use of the Act should document that street frontage is a valid measure of "special benefit." If frontage is not a directly indicator of benefit, use of this Act may be difficult to defend.

Landscaping and Lighting Act of 1972

(Streets and Highways Code section 22500 et seq.)

This Act may be used by cities, counties, and special districts (including school districts). Alleged abuse of the Landscaping and Lighting Act by cities and school districts was one of the motivating forces behind Proposition 218. The initiative targeted the allegedly tenuous link between parks and recreation facilities and the benefit they provided to properties in the area. Prior to Proposition 218, the successful argument in favor of the Landscaping and Lighting Act was that parks, open space, and recreation facilities benefited properties by increasing their value. As a result of the strict definition of special benefit created by Proposition 218 ("General enhancement of property value does not constitute 'special benefit.'"), that justification no longer exists and this Act will be much harder to use.

The 1972 Act enables assessments to be imposed in order to finance:

- acquisition of land for parks, recreation, and open space;
- installation or construction of planting and landscaping, street lighting facilities, ornamental structures, and park and recreational improvements (including playground equipment, restrooms and lighting); and,
- maintenance and servicing of any of the above.

Amendments to the Act, effective January 1, 1993, exclude from the authorized improvements any community center, municipal auditorium or hall, or similar public facility, unless approved by the property owners owning 50 percent of the area of assessable lands within the proposed district. The election shall be conducted following the adoption of an ordinance or resolution at a regular meeting of the legislative body of the local agency and is in lieu of any public notice or hearing otherwise required by this part.

As of this writing, the public notice and assessment procedure under the Act conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218.

Benefit Assessment Act of 1982

(Government Code section 54703 et seq.)

This statute provides a uniform procedure for the enactment of benefit assessments to finance the maintenance and operation costs of drainage, flood control, and street light services and the cost of installation and improvement of drainage or flood control facilities. Under legislation approved in 1989 (SB 975, Chapter 1449), this authority is expanded to include the maintenance of streets, roads, and highways. As with most other assessment acts, it may be used by cities, counties, and special districts which are otherwise authorized to provide such services. It does, however, have some differences that set it apart.

Assessments can be levied on a parcel, a class of property improvement, use of property, or any combination thereof. Assessments for flood control services can be levied on the basis of proportionate stormwater runoff from each parcel rather than a strict evaluation of the flood protection being provided. The amount of assessment must be evaluated and reimposed annually. Assessments are collected in the same manner as property taxes.

As of this writing, the public notice and assessment procedure under the Act conflicts with the provisions of Proposition 218. Also, the Act states that an assessment may be levied wherever service is available, regardless of whether the service is actually used - this may conflict with the initiative's definition of "special benefit." Where differences exist between statute and initiative, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218.

Integrated Financing District Act

(Government Code section 53175 et seq.)

This legislation creates an alternate method for collecting assessments levied under the 1911, 1913, and 1915 Acts, the Landscaping and Lighting Act of 1972, the Vehicle Parking District Law of 1943, the Parking District Law of 1951, the Park and Playground Act of 1909, the Mello-Roos Community Facilities Act of 1982, the Benefit Assessment Act of 1982, and charter cities' facility benefit assessments. The Integrated Financing District Act applies to all local agencies insofar as those agencies have the authority to use any of the above listed financing acts. Assessments levied under this act can be used to pay the cost of planning, designing, and constructing capital facilities authorized by the applicable financing act, pay for all or part of the principle and interest on debt incurred pursuant to the applicable financing act, and to reimburse a private investor in the project.

The Integrated Financing District Act has two unique properties:

(1) it can levy an assessment which is contingent upon *future* land development and payable upon

approval of a subdivision map or zone change or the receipt of building permits;

(2) it allows the local agency to enter into an agreement with a private investor whereby the investor will be reimbursed for funds advanced to the agency for the project being financed.

Because the assessment is not triggered until development is ready to begin, these features make the act an attractive option when development is to occur in phases. Payment of assessments will be deferred until such time as public improvements are needed.

The procedure for creating an integrated financing district, including entering into a reimbursement agreement, is in addition to the procedure required by the applicable assessment act. The resolution of intention must include a description of the rates and method of apportionment, the contingencies which will trigger assessment of the levy, the fixed dollar amount per unit of development for the contingent levy, and a description of any proposed reimbursement agreement. The assessment and entry into any agreement are effective upon approval of the legislative body.

As of this writing, the public notice and assessment procedure under the Act conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218.

Street Lighting Act of 1919

(Streets and Highways Code section 18000 et seq.)

This act allows cities to levy benefit assessments for the maintenance and operation of street lighting systems. Assessments may also finance the installation of such a system by a public utility.

Assessments are liens against land and are due within 30 days of being recorded by the tax collector. The 1919 Act also establishes two alternate methods for collecting payments on an installment basis in the manner of property taxes. An assessment levied under this act must be evaluated and reapplied annually after a public hearing, and , pursuant to Proposition 218, a vote of the property owners.

As of this writing, the public notice and assessment procedure under the Act conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218.

Municipal Lighting Maintenance District Act of 1927

(Streets and Highways Code section 18600 et seq.)

This statute provides for the maintenance and operation (but not the installation) of street lighting systems within cities. Assessments are limited to a maximum of 5 years.

As of this writing, the public notice and assessment procedure under the Act conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218.

Street Lighting Act of 1931

(Streets and Highways Code section 18300 et seq.)

The 1931 Act is another means for cities to finance the maintenance and service (but not installation) of street lighting systems. Assessments under this act are levied annually and collected in installments in the manner of city taxes. The term of assessment is limited to 5 years.

As of this writing, the public notice and assessment procedure under the Act (which resembles the procedure under the 1919 Street Lighting Act) conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218.

Parking District Law of 1943

(Streets and Highways Code section 31500 et seq.)

This act authorizes a city or county to levy assessments to finance:

- the acquisition of land for parking facilities;
- the construction, operation, and maintenance of parking facilities (including garages); and,
- the costs of engineers, attorneys or other people necessary to acquisition, construction, operations, and maintenance.

The Parking District Law incorporates the assessment procedures and powers of the 1911, 1913, and 1915 Acts discussed previously. It also authorizes the use of meters, user fees, and ad valorem taxes to raise funds.

Once parking facilities have been acquired, administration of the parking district is turned over to a “Board of Parking Place Commissioners” appointed by the city mayor or county board of supervisors. This board reports to the legislative body on the status of the district each year. Annual assessments are levied by the legislative body, in accordance with Proposition 218.

As mentioned earlier, the public notice and assessment procedures of the 1911, 1913, and 1915 Acts currently conflict with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218.

Parking District Law of 1951

(Streets and Highways Code section 35100 et seq.)

Cities are authorized to finance the following activities under this act:

- acquisition of land for parking facilities (including the power of eminent domain);
- improvement and construction of parking lots and facilities;
- issuance of bonds; and,
- employee salaries.

Special assessments under the 1911 Act may be levied to replace the use of fees and charges to repay outstanding bonds. Other revenue sources may include user fees, parking meter charges, and ad valorem taxes.

District formation proceedings are initiated upon petition of involved land owners and generally follow the pattern of other assessment acts. As in the 1943 Act, the district is to be administered by an appointed parking commission.

As with those other acts, the public notice and assessment procedure of the 1951 Act currently conflicts with the provisions of Proposition 218. Where differences exist, the requirements of the initiative prevail. Legislation is needed to reconcile the Act with Proposition 218.

Parking and Business Improvement Area Law of 1989

(Streets and Highways Code section 36500 et seq.)

This act recodifies and supplants the 1979 law of the same name, now repealed. The Parking and Business Improvement Area Law of 1989 enables a city, county, or joint powers authority made up of any combination of cities and counties to establish areas of benefit and to levy assessments on businesses within those areas to finance the following improvements:

- parking facilities;
- parks;
- fountains, benches, and trash receptacles;
- street lighting; and,
- decorations.

Assessment revenues may also be used for any of the following activities:

- promotion of public events benefiting area;
- businesses which take place in public places within the area;
- furnishing music to any public place in the area;
- promotion of tourism within the area; and,
- any other activities which benefit businesses located in the area.

Assessments must be directly proportional to the estimated benefit being received by the businesses upon which they are levied. Furthermore, in an area formed to promote tourism, only businesses that benefit *from* tourist visits may be assessed. The agency creating the assessment district area is authorized to finance only those improvements or activities which were specified at the time the area is formed. An unusual feature of this law is that assessments may be apportioned differently among zones of benefit, in relation to the benefit being received by businesses within each zone. The agency should carefully document the special benefit which each assessed property willreceive. Pursuant to Proposition 218, the assessment cannot finance improvements or services of general benefit.

Establishment proceedings may be initiated by either the legislative body of the city or county. The procedure is generally similar to other assessment acts and requires adoption of a resolution of intention and a noticed public hearing at which protests may be considered. If written protests are received from the owners of businesses which would pay 50 percent or more of the proposed assessment, the formation proceedings must be set aside for a period of one year. If these protests are only against a particular improvement or activity, the legislative body must delete that improvement or activity from the proposal. After a district has been established under this law, the legislative body must appoint an advisory board to make recommendations on the expenditure of revenues from the assessment. The advisory board may also be appointed prior to the adoption of a resolution of intention to make recommendations regarding that notice.

There's some ambiguity over whether Proposition 218 applies to the 1989 Law. Arguably, it does not apply since assessments are levied on businesses and are therefore not "a charge upon real property." Agencies should approach this assessment act with caution and a strong opinion from counsel before choosing not to comply with Proposition 218.

Property and Business Improvement District Law of 1994

(Streets and Highways Code section 36600 et seq.)

A city, county, or joint powers authority made up of cities and counties may adopt a resolution of intention to establish this type of district upon receiving a written petition signed by the property owners of the proposed district who would pay more than 50 percent of the assessments being proposed. The city, county, or JPA must appoint an advisory board within 15 days of receiving a petition which shall make recommendations to the legislative body regarding the proposed assessments (Streets and Highways Code section 36631).

The improvements which may be financed by these assessments include those enumerated under the Parking and Business and Improvement Area Law of 1989, as well as such other items as:

- closing, opening, widening, or narrowing existing streets;
- rehabilitation or removal of existing structures; and
- facilities or equipment, or both, to enhance security within the area.

Assessment revenues may finance the activities listed under the 1989 Law, as well as the following:

- marketing and economic development; and
- security, sanitation, graffiti removal, street cleaning, and other municipal services supplemental to those normally provided by the municipality.

No provision is made within this law for financing bonded indebtedness.

The property owners' petition is required to include a management district plan consisting of a parcel-specific map of the proposed district, the name of the proposed district, a description of the proposed boundaries, the improvements or activities being proposed over the life of the district and their cost, the total annual amount proposed to be expended in each year of the district's operation, the proposed method and basis of levying the assessment, the time and manner of collecting assessments, the number of years in which assessments will be levied (this is limited to five years maximum), a list of the properties being benefited, and other related matters (Streets and Highways Code 36622).

The legislative body's resolution must include the management district plan as well as the time and place for a public hearing on the establishment of the district and levy of assessments will be held (Streets and Highways Code 36621). This hearing must be held within 60 days after the adoption of the resolution. Hearing notice must be provided pursuant to Government Code section 54954.6. Both mailed and newspaper notice are required (Streets and Highways Code section 36623).

The proposal to form the district must be abandoned if written protests are received from the owners of real property within the proposed district who would pay 50 percent or more of the assessments (Streets and Highways Code section 36625). In addition, when a majority protest has been tendered, the legislative body is prohibited from reinitiating the assessment proposal for a period of one year.

The public notice and assessment procedures of the 1994 Law are similar to the provisions of Proposition 218. An agency proposing to use the Act should take care to ensure that they are proceeding in harmony with Proposition 218 and that the properties being assessed are receiving an actual special benefit. Where conflicts exist, the requirements of the initiative prevail.

No assessments under this law can be levied on residential properties or on land zoned for agricultural use (Streets and Highways Code section 36635).

This statute is an alternative to the Parking and Business and Improvement Area Law of 1989 and does not affect any districts formed under that law.

Pedestrian Mall Law of 1960

(Streets and Highways Code section 11000 et seq.)

This authorizes cities and counties to establish pedestrian malls, acquire land for such malls (including power of eminent domain), restrict auto traffic within the malls, and to levy benefit assessments to fund mall improvements. Improvements may include:

- street paving;
- water lines;
- sewer and drainage works;
- street lighting;
- fire protection;
- flood control facilities;
- parking areas;
- statues, fountains and decorations;
- landscaping and tree planting;
- child care facilities;
- improvements necessary to a covered air-conditioned mall; and,
- relocation of city-owned facilities.

Assessments may also be used to pay damages awarded to a property owner as a result of the mall.

Establishment proceedings are similar to those found in other assessment acts. Accordingly, these provisions do not currently conform to the requirements of Proposition 218 and await reconciliation. Where conflicts exist, the requirements of the initiative prevail. Assessments and bonds are to be levied in accordance with the provisions of the Vehicle Parking District Law of 1943 (which provides for use of the 1911 and 1915 Acts, among others).

Permanent Road Divisions Law

(Streets and Highway Code sections 1160 et seq.)

This statute enables counties to establish areas of benefit (called "divisions" under this law) within which assessments may be levied in order to finance construction, improvement, or maintenance of any county road, public road easement, or private road or easement which contains a public easement (Streets and Highways Code section 1179.5). The statute also empowers a board of supervisors to levy special taxes for these purposes upon approval by 2/3 of the electorate within the division.

Proceedings for the formation of a road division may be initiated by either: (1) a resolution of the Board of Supervisors; or, (2) submittal to the Board of Supervisors of a petition containing either the signatures of a majority of the land owners within the proposed division or the owners of more than 50 percent of the assessed valuation. The public notice and assessment procedures of the Permanent Road Divisions Law conflict with the provisions of Proposition 218 by failing to provide for a property owners' ballot. The requirements of Proposition 218 must be followed in order to establish a division. Legislation is needed to reconcile the Act with Proposition 218.

Community Rehabilitation District Law of 1985

(Government Code section 53370 et seq.)

This act provides a means for cities and counties to finance the rehabilitation, renovation, repair or restoration of existing public infrastructure. It cannot, however, be used to pay for maintenance or services. A Community Rehabilitation District cannot be formed within a redevelopment project area.

A district established under the 1985 Act can rehabilitate public capital facilities such as:

- streets;
- sewer and water pipes;
- storm drains;
- sewer and water treatment plants;
- bridges and overpasses;
- street lights;
- public buildings;
- criminal justice facilities;
- libraries; and,
- park facilities.

It can also finance the expansion of facility capacity or the conversion to alternative technology.

The 1985 Act allows a rehabilitation district to use any of the following financing tools:

- Special assessments under the Improvement Act of 1911 and the Municipal Improvement Act of 1913 and bonds under the Improvement Bond Act of 1915.
- Special taxes and bonds pursuant to the Mello-Roos Community Facilities Act of 1982.
- Fees or charges, provided that these do not exceed the amount reasonably necessary to cover the cost of the involved project.
- Senior obligation bonds under the 1985 Act's own provisions (Gov. Code section 53387 et seq.).

Certain of the public notice and assessment procedures of this act conflict with Proposition 218. An agency proposing to use the Community Rehabilitation District Law should take care to ensure that they are proceeding in harmony with Proposition 218 and that the properties being assessed are receiving a concrete special benefit. Under Proposition 218, a general enhancement of property value is not a special benefit.

Public notice must be provided over a period of 5 weeks prior to the district formation hearing. This notice must contain the text of the resolution of intent, the time and place of the hearing, and a statement that the hearing will be open to all interested persons in favor of or opposed to any aspect of the district. If the district will utilize any of the above special assessment or community facilities acts, it may combine the notices required by those acts with this notice.

A separate procedure exists for issuing, administering, and refunding senior obligation bonds pursuant to the 1985 Act (Gov. Code sections 53387 - 53594). Issuance involves adopting a resolution of intention and submitting the bond issue to the voters of the district. Affirmation by a simple majority of voters is necessary to approve issuance of the bonds.

Geologic Hazard Abatement District

(Public Resources Code section 26500 et seq.)

This statute authorizes a city or county to create an independent Geologic Hazard Abatement District (GHAD) empowered to finance the prevention, mitigation, abatement, or control of actual or potential geologic hazards through the levy and collection of special assessments. The statute broadly defines geologic hazards to include: landslides, land subsidence, soil erosion, earthquakes, or "any other natural or unnatural movement of land or earth."

A district can:

- acquire property by purchase, lease, gift, or eminent domain;
- construct improvements;
- maintain, repair, or operate any improvements; and,
- use any of the assessment and bond procedures established in the Improvement Act of 1911, the

Municipal Improvement Act of 1913, and the Improvement Bond Act of 1915.

Proceedings for forming a GHAD may be initiated by resolution of the city or county or by petition of the owners of at least 10% of affected property. A landowner petition must include signatures, legal descriptions, and a map of the proposed district boundaries. In addition, the city, county, or petitioners must include a "plan of control" prepared by an engineering geologist which describes the geologic hazard to be addressed, its location, the affected area, and a plan for the prevention, mitigation, abatement, or control of the hazard.

When forming a GHAD, the legislative body of the city or county can be the governing body of the district. Alternatively, the legislative body can appoint five land owners to act as the district's board of directors. Thereafter, board members will be elected every four years from within the district. Unlike most special assessment districts, the GHAD is an entity independent of the city or county.

The current procedure for forming a GHAD conflicts with Proposition 218 in that it does not provide for a property owners' ballot on the question of formation. When forming a GHAD, the city or county must conform its procedure to the engineer's report, public notice, balloting, and other requirements of Proposition 218.

The statute also provides for emergency formation of a GHAD upon the request of two-thirds of the affected property owners (Public Resources Code sections 26568-26597.7). This is invalid to the extent it conflicts with Proposition 218.

The statute does not describe the method for dissolving a GHAD. However, the California Court of Appeal has opined that dissolution of a GHAD is subject to the procedures of the Cortese-Knox Local Government Reorganization Act (Gov. Code 56000, et seq.) and cannot be unilaterally undertaken by a city (*Las Tunas GHAD v. Superior Court (City of Malibu)* (1995) 38 Cal.App.4th 1002). Under this interpretation, although district formation is undertaken by a city or county without the involvement of the county Local Agency Formation Commission (LAFCO), dissolving a district requires adherence to LAFCO procedures.

A GHAD has several advantages to recommend it. One, its boundaries need not be contiguous, so it can focus on just those properties subject to hazard. Second, it is an independent district with its own board of directors drawn from the affected property owners. Third, it is not limited to a single city or county; its boundaries can cross jurisdictional lines. Fourth, its formation proceedings are not subject to review by the Local Agency Formation Commission, thereby simplifying the process. Fifth, its formation is exempt from the California Environmental Quality Act.

Contra Costa County has formed GHADs in its Blackhawk and Canyon Lakes developments. In both, the County Board of Supervisors serves as the governing body.

Open Space Maintenance Act

(Government Code sections 50575 et seq.)

Cities and counties are empowered to spend public funds to acquire open space land for preservation (Government Code sections 6950-6954). The Open Space Maintenance Act provides a means to levy an ad valorem special assessment to pay for the following services related to such land:

- conservation planning;
- maintenance;
- improvements related to open space conservation; and,
- reduction of fire, erosion, and flooding hazards through clearing brush, making fire protection improvements not otherwise provided the area, planting and maintaining trees and other vegetation, creating regulations limiting area use, and construction of general improvements.

The owners of lands representing 25% or more of the value of the assessable land within the proposed district may initiate district formation by filing a petition with the involved city or county. The local legislative body must then prepare a preliminary report containing a description of the proposed boundaries, the work to be done, an estimate of the cost of the assessment, and illustrating the parcels to be benefitted. The planning commission must review the report and make recommendation to the legislative body. Once the legislative body has reviewed the report, concluded that such a district is justified, and adopted an ordinance of intention to form an assessment district, it will set a time and place for hearing objections to the proposal. The ordinance of intention must specify the district boundaries, the proposed projects, the annual assessment, the maximum assessment, and the time of the protest hearing (Government Code section 50593). Notice must be placed in a newspaper of general circulation, mailed to involved property owners, and posted in a public place. The formation proceedings in current law conflict with the requirements of Proposition 218. A city or county must be careful to substitute the requirements of Proposition 218 for any conflicting provisions in the code. This statute needs to be amended to reconcile it with Proposition 218.

Fire Suppression Assessment
(Government Code section 50078 et seq.)

Special districts, county service areas, counties, and cities which provide fire suppression services (including those provided by contracting with other agencies) are authorized to levy assessments under this act. The resulting revenues may be used to obtain, furnish, operate, and maintain fire fighting equipment and to pay salaries and benefits to firefighting personnel.

Unlike the other special assessment acts, invocation of fire suppression assessments does not require establishment of an assessment district. Instead, the jurisdiction levying the assessment specifies those parcels or zones within its boundaries that will be subject to assessment.

Assessments are based upon uniform schedules or rates determined by the risk classification of structures and property use. Agricultural, timber, and livestock land is assessed at a lower rate on the basis of relative risk to the land and its products. The local agency may establish zones of benefit, restricting the applicability of assessments. In addition, assessments may be levied on parcels, classes of improvement or property use or any combination thereof. Assessments are proportional to the fire protection benefits received by property and improvements, but may be levied whether or not the service is actually used.

The procedure for establishing a fire suppression assessment includes:

- filing of a report which details the land to be assessed, the initial amount of assessment, the maximum assessment, the duration of the assessment, and the schedule or rate of assessment;
- public notice and hearing;
- protest procedures; and,
- adoption of an ordinance or resolution imposing the levy.

Proposition 218, with its strict definition of "special benefit," may pose a problem for new or increased assessments under this code. In fact, some jurisdictions, such as the Tamalpais Valley Fire District and the County of Los Angeles, have placed fire protection levies before the voters as special taxes (subject to two-thirds approval), effectively converting them from assessments.

The agency proposing to levy fire suppression assessments must be careful to document the special benefit (excluding any benefit to the general public and any general enhancement of property value) accruing to each parcel that is included in the assessment district. In addition, the formation proceedings in current law conflict with the requirements of Proposition 218. A city or county must substitute the requirements of Proposition 218 for all conflicting provisions in the code.

Facilities Benefit Assessment

The City of San Diego is levying assessments for capital improvements in urbanizing areas designated on its general plan. The city's Facilities Benefit Assessment (FBA) ordinance is generally based upon the Municipal Improvement Act of 1913, but relies upon this charter city's home rule powers rather than state statutes for authority. It is being used to pay for capital improvements such as major arterial and local streets, sewer and water facilities, a park and ride lot, a fire station, and a library in the North City West Community Plan area.

The FBA ordinance establishes areas of benefit to be assessed for needed improvements in newly developing areas. Each parcel within an area of benefit is apportioned its share of the total assessment for all improvements (including those required for later development phases) which is then recorded on the assessment roll. Assessments are liens on private property as with the state assessment acts. Upon application for a building permit the owner of the parcel must pay the entire assessment (the payment is pro rated if only a portion of the parcel is being developed at one time). Payment releases the city's lien on the property. The funds that are collected are placed in separate accounts to be used for the needed improvements and do not exceed the actual cost of the improvements plus incidental administrative costs. San Diego's FBA financing relies upon assessments only and does not provide for issuing bonds.

The procedure for levying assessments laid out in the city's FBA ordinance parallels the state improvement acts. For the North City West Public Facilities Financing Plan FBA, the city prepared a report detailing needed improvements, construction costs and schedule, the proposed area of benefit, and the proposed formula for apportioning the assessment. After adopting the report and a notice of intention to consider enacting the assessment, the city scheduled a public hearing for the purpose of considering protests. At the hearing, the city presented additional information regarding the proposed boundaries of the areas of benefit, the facilities to be constructed, the method of apportionment, the method of computing annual increases in the assessment, and the amount of the city's contribution toward the cost of the improvements.

Assessments are apportioned based upon the parcels' Equivalent Dwelling Units (EDU). EDUs were assigned according to the development potential of the land as projected by the community plan, final map, or other measure. EDUs were computed prior to adopting the FBA after consultation with developers and landowners.

San Diego's FBA has been upheld by the courts in the face of challenges that it was a "special tax" subject to Proposition 13 requirements and that it was beyond the city's authority to enact (*J.W. Jones v. City of San Diego* (1984) 157 Cal.App.3d 745 and *City of San Diego v. Holodnak* (1984) 157 Cal.App.3d 760).

The City of Sacramento has established an FBA that clones San Diego's model. Sacramento is using it to pay for $16 million worth of improvements within the city's South Natomas Community Plan area. These include: traffic signals; bridges; street extensions and widening; and portions of a library, a community center and a fire station. As in San Diego, the city collects the full assessment when building permits are issued and there is no mechanism for issuing bonds.

Charter cities are subject to the requirements of Proposition 218. A city undertaking a facilities benefit assessment in the future, or proposing to increase an existing assessment, must comply with all the requirements and limitations of the initiative.

Seismic Safety Assessment

The city of Long Beach is using its powers as a charter city in forming a special assessment district to finance the private building improvements mandated by the city's seismic safety ordinance. Like many other cities, Long Beach requires that older buildings be brought up to current seismic safety standards. A strict city ordinance requires the demolition of pre-1934 buildings that have not been upgraded by 1991.

Participation in the district is voluntary. Building owners who want to be included in its boundaries must pay a non-refundable, good faith deposit and provide the city an accurate estimate of the probable cost of complying with the seismic safety ordinance. Once the city has received the owners' cost estimates and deposits, it will initiate district formation proceedings. The formation procedure is modeled after the 1911 and 1913 Acts.

After formation of the assessment district, the city issued $17.44 million in taxable bonds to finance the district-wide cost of the improvements. Individual assessments will be equal to the cost of bringing a particular building into compliance with code, plus a share of the debt service and administrative costs.

Through the following measures, Long Beach will ensure that the funds collected by the assessment district (and the associated bond sale) go directly to addressing the community health and safety concerns embodied in its seismic safety ordinance.

- The city will be responsible for hiring the necessary contractors to upgrade participating buildings. No payments or loans will be made to building owners.
- The scope of the work will be limited solely to those improvements required by the city's seismic safety code. For example, fire sprinklers will not be installed because they are not mandated by the ordinance.

Chapter IV
Fees and Exactions

Fees and exactions are really two facets of the same thing: direct charges or dedications collected on a one-time basis as a condition of an approval being granted by the local government. The purpose of the fee or exaction must directly relate to the need created by the development. In addition, its amount must be proportional to the cost of improvement.

Fees can be categorized in four major classes: (1) development impact fees (often called "developer fees") which are levied on new development to cover the cost of infrastructure or facilities necessitated by that development; (2) permit and application fees which cover the cost of processing permits and development plans; (3) regulatory fees; and (4) "property related fees and charges," as defined by Proposition 218. This chapter will focus primarily on developer fees and property related fees and charges.

Proposition 218 does not apply to "existing laws relating to the imposition of fees or charges as a condition of project development" (Section (b)(1), Article XIIID, California Constitution). Accordingly, development impact fees continue to be governed by the Mitigation Fee Act (Government Code section 66000, et seq.) and do not require voter approval. Similarly, Proposition 218 does not apply to permit and application fees. As will be discussed later, Proposition 218 requires property related fees and charges to be put to a vote of affected property owners, and classifies "standby fees" the future installation of utilities as assessments not fees, subject to its limitations and voting requirements.

Proposition 218 provides that any fee "imposed by an agency upon a parcel or a person as an incident of property ownership, including a user fee or charge for a property related service" requires prior approval of a simple majority of affected property owners or a two-thirds majority of the voters in the affected area. The initiative also lays out the specific method for establishing such fees. These requirements are detailed in the following section entitled "Property Related User Fees and Standby Charges."

Traffic mitigation fees, infrastructure improvement fees, and fees for improving sewer and water systems to accommodate new development are common examples of development impact fees. "Exaction" is a broader term for impact fees, dedications of land, and in-lieu fees that are imposed to fund public improvements necessitated by the proposed development. School facility fees, park land dedication requirements, and road dedication and improvement are all examples of exactions.

IMPACT FEES AND EXACTIONS

After the passage of Proposition 13, local government found itself with less money to pay for infrastructure improvements. In the past, cities and counties have, to a certain extent, subsidized new development by installing infrastructure or by charging impact fees that did not pay for the entire cost of the infrastructure necessitated by the project. Today, as new development occurs, cities and counties find themselves unable to afford the improvements that the development will need. They are turning to the developer to carry the burden of these costs. As a general rule, if the local government has the power to deny a project, then it also has the power to approve it subject to conditions that mitigate the reason for denial.

A development impact fee is an exaction that is imposed as a precondition for the privilege of developing land. Such fees are commonly imposed on developers by local governments in order to lessen the impacts of increased population or demand on services generated by that development. Local governments derive their authority to impose exactions from two sources: the "police power" granted to them by the State Constitution; and/or specific state enabling statutes such as the Subdivision Map Act.

Exactions and impact fees give new meaning to the old saying "you get what you pay for." Developers, and the new home buyers to whom the costs are passed, now find that they are paying more for what they get than ever before. A 1987 survey by the Bay Area Council found that the average impact fee for single family homes in the San Francisco Bay Area had increased by 644% in the previous ten years. At that time, the median fee for building a small detached residence was $9110. Fees have continued to rise in the 10 year since.

The increasing costs of impact fees is exacerbated by the cumulative effect of paying fees for more than one purpose and to more than one public entity. For example, the City of Roseville collects a parks fee, a sewer connection fee, a public facilities fee, and other fees. Its school district also imposes a fee.The total fees associated with new home construction in Roseville may exceed $13,000. Similar fee levels can be found in the cities of San Jose, San Ramon, and Anaheim.

As the dollar amount of impact fees has increased, so has the range of uses to which exactions are being put. The City of San Francisco collects impact fees from downtown commercial development for public transit improvements, low and moderate-income housing, and child care. The City of Irvine collects impact fees for traffic improvements. Concord funds child care through impact fees paid by non-residential development. Fresno uses impact fees to pay for fire stations, overpasses, railroad crossings, and traffic signals required by new growth. Orange County and its cities collect impact fees from new subdivisions to fund the construction of four major highway corridors.

Establishing reasonable and defensible impact fees is a special science. Cities and counties must be careful to limit fees to reasonable levels, to apply such fees equitably and proportionally, and to comply with the Mitigation Fee Act. For an excellent general discussion of this topic, refer to: ***The Calculation of Proportionate-Share Impact Fees***, PAS Report No. 408, by James Nicholas and available from the American Planning Association. Although this book does not address California law's special requirements, its detailed suggestions for relating fees to projected impacts are helpful when drafting an impact fee ordinance. A more detailed reference is the highly informative ***Public Needs and Private Dollars*** and its 1995 supplement by William Abbott, Marian E. Moe, and Marilee Hansen (available from Solano Press Books, Point Arena, CA). It discusses the legal basis for impact fees and offers practical, California-specific advice about calculating and imposing such fees.

Subdivision Exactions

The Subdivision Map Act (Government Code section 66410 et seq.) gives cities and counties statutory authority to impose fees or dedications of land for specific uses as conditions of subdivision map approval.

The Map Act provides that certain types of exactions may only be imposed if a local subdivision ordinance contains specific enabling language to do so. The following sections of the Map Act provide enabling authority for such local ordinances.

- section *66475* – dedication of streets and alleys within the subdivision.
- section *66475.1* – dedication of bike paths in conjunction with streets and alley dedications.
- section *66475.2* – when the subdivision has the potential for 200 or more dwelling units, covers 100 or more acres or when transit services are or will be available to it, the jurisdiction may require dedication of land for local transit facilities.
- section *66475.3* – sunlight easements to facilitate solar energy use.
- section *66477* (Quimby Act) – dedication of land or payment of an in-lieu fee to provide park and recreation facilities to serve the subdivision. The amount of the exaction is limited by statute and must be based upon the policies and standards contained in an adopted general or specific plan.
- section *66478* – dedication of school sites to serve the subdivision. Such a dedication must be requested by the affected school district.
- section *66479* – areas within the subdivision may be reserved for parks, recreational facilities, fire stations, libraries, and other public uses based upon the policies and standards of an adopted general or specific plan. The local jurisdiction must enter into an agreement with the subdivider that specifies when the jurisdiction will purchase the reserved land.
- section *66483* – fees to pay for the construction of planned drainage or sewer facilities to serve the subdivision.
- section *66484* – fees to pay for the installation of planned bridges and major thoroughfares to serve the subdivision.
- section *66484.3* – authorizes Orange County and its cities to collect countywide fees for planned major road construction.
- section *66484.5* – fees to pay for planned groundwater storage and recharge facilities within designated areas of benefit.

There are also exactions which may be imposed under the Subdivision Map Act without the adoption of a local enabling ordinance.

- sections *66478.4* & *66478.5* – local jurisdictions must assure that subdivisions provide public access to public waterways. Subdividers can be required to dedicate this access.

- section *66478.11* – a provision similar to the above, relating to coastal and bayshore access.
- section *66478.12* – public access must be provided to lakes and reservoirs.

Fees vs. Taxes and Assessments

Fees which do not exceed the reasonable cost of providing the regulatory activity or service for which they are charged and which are not levied for general revenue purposes are not "special taxes" (Government Code section 50076). If a fee is subjected to legal challenge, the jurisdiction that is charging the fee carries the burden of proving that it is not a special tax (Government Code section 50076.5). Fees may be further distinguished from taxes because they are voluntary (in that development is a voluntary act) rather than compulsory and are imposed only upon those developing land rather than upon all landowners or taxpayers uniformly.

The relationship between users fees and special assessments is not as clear. In *San Marcos Water District v. San Marcos Unified School District* (1986) 42 Cal.3d 154, the California Supreme Court concluded that "a fee aimed at assisting a utility district to defray costs of capital improvements will be deemed a special assessment from which other public entities are exempt." Although the primary holding in this case (that one district need not pay another district's capital facilities fee) has been revised by the State Legislature as discussed later in this chapter, its view of the relationship between fees and special assessments remains. Any fee which qualifies as an "assessment" under Proposition 218 is subject to the approval requirements applicable to assessments.

Several court cases decided before and after the passage of Proposition 13 have upheld fees and exactions against challenges that they are taxes or special assessments. Here is a brief look at some of the more important decisions.

- ***Associated Homebuilders of the East Bay v. City of Walnut Creek*** (1971) 4 Cal.3d 633 ratified the use of "Quimby Act"-type fees for exacting park and recreation land from new subdivision development. The court held that "a general public need for recreational facilities caused by present and future subdivisions" could justify the levying of exaction.
- ***Mills v. Trinity County*** (1980) 108 Cal.App.3d 656 upheld the imposition of local fees for processing subdivisions, zoning, and other land use applications as long as they do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged.
- ***Trent Meredith v. City of Oxnard*** (1981) 114 Cal.App.3d 317 upheld the validity of fees imposed under the School Facilities Act (authorizing exactions for interim school facilities) in the face of allegations that they constituted a special tax. The court pointed out that, unlike taxes, the fees were related to benefits received by or burdens created by the development.
- ***Terminal Plaza** C**orporation v. City and County of San Francisco*** (1986) 177 Cal.App.3d 892 held that an ordinance requiring developers to provide replacement units whenever residential structures were demolished or converted to another use could be imposed under the city's police power. The exaction was held to be reasonably related to the cost of services necessitated by the project and was not levied for general revenue purposes.
- ***Russ Building Partnership v. City and County of San Francisco*** (1987) 188 Cal.App.3d 977 upheld the city's exaction of a transit impact fee from new office development. The city had carefully established a factual basis for the fee before enacting it. The court concluded that the fee did not amount to double taxation because it was not imposed on the same property, at the same time, by the same authority, for the same purpose as any city tax. In fact, it was not a tax at all. "The fee in question was not aimed at replacing lost revenue. It is triggered by the voluntary action of the developer to construct something and directly tied to an increase in ridership generated by new development."

Here's an example of a fee which did not pass judicial muster. *Bixel v. City of Los Angeles* (1989) 216 Cal.App.3d 1208 illustrates the pitfalls of attempting to assign equitable fees to new development. Los Angeles charged Bixel Associates a fire hydrant and water main fee as a condition of issuing the building permit for a high rise office. Los Angeles had devised a formula for calculating such fees that was based on the ratio between the total amount that the city had spent for hydrants and water mains over a two year period and the value of work performed under building permits issued during that period.

The California Court of Appeal invalidated the city's fee ordinance, finding that the city's method of setting this fee failed to distinguish those costs which were solely attributable to new construction from those relating to routine repairs and maintenance. In addition, the fee ordinance did not expressly limit the use of fee revenues to improvements required by new development. As a result, the city could not demonstrate its compliance with the crucial principles that: (1) fees bear a reasonable relationship to the cost of the improvements necessitated by new development and (2) fees not be used for general revenue purposes.

Limits on Impact Fees and Exactions

The *Nollan* and *Dolan* Decisions

The U.S. Supreme Court holding in *Nollan v. California Coastal Commission* (1987) 107 S.Ct. 3141 has established that the power to impose exactions on development is not without limits. The U.S. Constitution guarantees that private land will not be taken without just compensation. This prohibition includes regulatory takings or inverse condemnation. An exaction will not be allowed to result in a taking. A legally defensible exaction must: (1) "advance a legitimate state interest" (such as protection of the public health, safety, and welfare); and, (2) mitigate the adverse impacts to that interest that would otherwise result from the project. An exaction may be imposed even if the development project itself will not benefit from it, when it is necessitated by the project's impacts on identifiable public resources. At least one view of the *Nollan* decision holds that exactions may only be required where the local government would otherwise be empowered to deny approval of the project.

The Nollan decision does not prohibit local governments from imposing impact fees or dedications as conditions of project approval. It does, however, require that government establish the existence of a "nexus" or link between the exaction and the state interest being advanced by that exaction. Once the adverse impacts of a project have been quantified, the local government must then document the relationship between the project and the need for the conditions which mitigate those impacts. This link may be forged by general plan policies or by special ordinances that are based upon studies or other objective evidence. Adoption of detailed findings, supported by evidence in the hearing record, is crucial to the enactment of a legally defensible fee ordinance.

AB 1600 of 1987 (Chapter 927) provides valuable guidance in this area by creating a statutory nexus requirement (Gov. Code sections 66000 et seq).

More recently, in *Dolan v. City of Tigard* (1994) 114S.Ct. 2309, the U.S. Supreme Court has held that in addition to the *Nollan* standard of an essential nexus, there must be a "rough proportionality" between proposed exactions and the project impacts that the exactions are intended to allay. The *Dolan* case focused on an administrative permit for expansion of a small plumbing and electrical supply business which was conditioned upon dedication of a bike lane and a storm drainage easement along an existing drainage channel. The Court overturned both exactions, holding that the city's conclusory findings were not specific enough to support the dedications.

Where *Nollan* established that there must be a nexus between the exaction and the state interest being advanced, *Dolan* added a second step to the analysis of exactions — there must be a "rough proportionality" between the exaction and the impacts of the project.The *Dolan* court offered this advice:

> "We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirements of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."

As in the *Nollan* case, the lesson to be learned is that public exactions must be carefully documented and supported. Many common exactions, such as street dedication, curb and gutter improvements, parks, and open space, will probably be able to meet the requirements of *Nollan* since they can be directly related to project impacts that would otherwise necessitate denial of the project. Whether all of these may withstand the stricter test created by *Dolan* is the question of the hour. Other, more exotic exactions, such as affordable housing, public art, and child care may be more difficult to impose if the local government cannot tie them directly to the impacts from the project. Some commentators believe that under the *Nollan* standard, exactions requiring the conveyance of land (dedications) may be subject to greater judicial scrutiny than fee exactions. In any case, dedications will be examined closely to determine whether they constitute impermissible "takings" without just compensation.

The *Ehrlich* Decision

The California Supreme Court clarified the *Nollan* and *Dolan* principles when it decided *Ehrlich v. City of Culver City* 12 C4th 854 in 1996. For over 20 years, Ehrlich owned a private tennis facility allowed under a specific plan and zoning approved by the city. When Ehrlich sought city approval to demolish the facility and replace it with luxury condominiums, an action which required rezoning the property and rescinding the specific plan, the city balked. After a period of dispute, the city eventually approved Ehrlich's proposal, subject to conditions including a recreational mitigation fee of $280,000 imposed ad hoc to enable the city to replace the loss of the tennis courts and a $33,200 in-lieu fee imposed under the city's "Art in Public Places" ordinance. Ehrlich challenged the constitutionality of these fees, alleging that there was no "essential nexus" (as required by *Nollan*) for imposing either aesthetic requirements or recreation mitigation fees on the project and that the fees being imposed were not "roughly proportional" to the impact of his project (the higher level of scrutiny required by *Dolan*).

The California Supreme Court's decision allowed both Ehrlich and Culver City to claim some element of victory. The court made two key points:

(1) Developers who wish to challenge a development fee on either statutory or constitutional grounds must do so under provisions of the Mitigation Fee Act (Government Code section 66000, et seq.).

(2) The two part *Nollan/Dolan* test applies only to ad hoc fees and dedications of land (as opposed to legislatively-enacted fees). The "rough proportionality" component does not apply to legislatively-enacted fees such as Culver City's Art in Public Places (here the court also held that this ordinance enacted to enhance aesthetics was a reasonable use of the city's police power under *Nollan*).

The California Supreme Court has distinguished between the imposition of legislatively-enacted and ad hoc fees. The ad hoc recreational mitigation fees, developed for this specific project and applied as a condition of approval, were subjected to a higher level of scrutiny (i.e., application of both *Nollan/Dolan* principles) than the legislatively-enacted art in public places fees, which were developed for general application. As Justice Mosk noted in his concurring opinion, greater scrutiny is needed so that the court may ensure that "the developer is not being subject to arbitrary treatment for extortionate motives. These singular fees present a greater possibility that the government is unfairly imposing disproportionate public burdens on a lone, and therefore particularly vulnerable, property owner."

Since the *Ehrlich* decision, the Legislature has amended the Mitigation Fee Act (Government Code section 66000, et seq.) to specify that its requirements apply to both legislatively-enacted and ad hoc fees (Government Code sections 66000 and 66020). Compliance with the Act should inoculate cities and counties from successful challenge under the *Nollan/Dolan* test.

The courts continue to clarify the *Nollan* and *Dolan* holdings. In *Loyola Marymount University v. Los Angeles Unified School District* (1996) 45 Cal.App.4th 1256, a California court of appeal held that the two-part *Nollan/Dolan* test did not apply to a school impact fee that was imposed on the basis of the state school impact fee law (Government Code Sections 53080 and 65995).

Statutory Limits

In 1987, at almost the same time that the U.S. Supreme Court was handing down its decision in the *Nollan* case, the California Legislature approved AB 1600 (Chap. 927, Stats. of 1987), a bill requiring local agencies to establish a "nexus" or link between the fees being exacted and the needs created by the project paying the fees as well as to account for the ultimate use of any fees. These requirements and subsequent amendments are codified at sections 66000 et seq. of the Government Code.

By its own terms, the Mitigation Fee Act applies to development impact fees imposed by local agencies to finance all or part of the cost of public facilities (such as streets, traffic signals, bridges and major thoroughfares, drainage and flood control facilities, water and sewer, and government buildings). These requirements do not apply to taxes or special assessments (which are not fees), Quimby Act fees, processing fees, fees collected under a development agreement, or certain fees collected by redevelopment agencies. "Local agency" is defined to include counties, cities, special districts and school districts (Government Code section 66000 (c)).

Whenever establishing, imposing, or increasing a fee "as a condition of approval of a development project," the local agency imposing the fee must identify the purpose of the fee and the use to which it will be put. The local agency must also specify the nexus between the development project (or class of project) and the improvement being financed (Government Code section 66001). It must further establish that the amount of funds being collected will not exceed that needed to pay for the improvement (Government Code section 66005).

Revenues resulting from such fees must be kept and administered in a separate account or fund dedicated to the public improvements being financed and must not be commingled with other revenues and funds of the local agency (Government Code section 66006). In addition, five years after the first deposit into the account or fund, the local agency must make specific findings regarding any unexpended funds, whether those funds are committed to expenditure or not (Government Code section 66001). The same findings must continue to be made once every five years thereafter. If these findings are not made, statute requires the agency to refund the fees to the current owner of the affected property. Refunds may be made by direct payment, temporary suspension of fees, or “other reasonable means,” at the discretion of the local agency.

In its findings under section 66001, the agency must:

(1) identify the purpose to which the fee is put;

(2) demonstrate a reasonable relationship between the fee and purpose for which it is charged;

(3) identify all sources and amounts of funding anticipated to be used to finance the incomplete improvements; and

(4) designate the approximate dates on which the above funding is expected to be deposited into the appropriate account or fund.

The following discusses some of the other aspects of these statutes.

- Government Code section 66001 requires that when sufficient funds have been amassed to complete the financing of public improvements for which impact fees have been collected (as determined in the annual fiscal report required under section 66006), but the improvements have not been completed, the agency must either identify “an approximate date by which the construction of the public improvement will be commenced” or refund the unexpended portion of the funds to the current record owners of the affected properties on a prorated basis.
- Government Code section 66006 requires that fees collected for an improvement related to a development project must be deposited in a separate fund or account and are to be expended "solely for the purpose for which the fee was collected." It further requires that the agency make a yearly public financial disclosure for each of its fee accounts. The provisions of this section apply to all development projects, including residential, commercial, and industrial.

  Within 180 days of the end of each fiscal year, the agency must make the following information available:

  (1) a brief description of the type of fee in the account;

  (2) the amount of the fee;

  (3) the beginning and ending balance of the account;

  (4) the fees collected that year and the interest earned;

  (5) an identification of each public improvement for which the fees were expended and the amount of the expenditures for each improvement;

  (6) an identification of an approximate date by which construction of the improvement will commence if the local agency determines that sufficient funds have been collected to complete financing of an incomplete public improvement;

  (7)a description of each inter-fund transfer or loan made from the account or fund, including the public improvement on which the transferred or loaned fees will be expended, the date on which any loan will be repaid, and the rate of interest to be returned to the account; and

  (8) the amount of money refunded under section 66001.

  The public agency must review the fiscal report at its next scheduled public hearing after public release of the report. Section 66006 specifies the requirements 15-day advance public notice.
- Government Code section 66006.5 provides that a city or county which is imposing a fee or charge for transportation purposes may, by ordinance, create a procedure for accepting property dedications in lieu of full or partial payment of that fee or charge.
- Government Code section 66007 prohibits a local government which has imposed fees for the construction of public improvements or facilities as part of a residential development from requiring payment of the fee prior to the date of final inspection or the issuance of final occupancy certificate, whichever comes first. As a condition of granting the building permit, the local agency may require the developer to execute a contract promising to pay the required fee upon final inspection or issuance of a certificate of occupancy.

  When a project involves more than one dwelling, the local agency can determine whether: (1) the fee is to be paid in a lump sum when the first residence receives its final inspection or certificate of occupancy; (2) the fee is to be paid on a pro rata basis when a certain percentage of the dwellings have received their final inspection or certificate of occupancy; or (3) the fee is to be paid on a pro rata basis for each dwelling as it receives its final inspection or certificate of occupancy.

  Fees may be collected before the final inspection or certificate of occupancy stage if the local agency determines that:

  (1) the fees will be collected for an improvement or facility for which an account has already been established and funds appropriated and the local

agency has adopted a proposed construction schedule or plan for the project (i.e., a capital improvement plan or five-year school facilities plan; or,

(2) the fees are to reimburse the agency for expenditures it has already made.

Section 66007 does not apply to fees collected to cover the cost of code enforcement or inspection services.

- Government Code section 66008 was enacted in 1997 in response to reports that the accounts established for development fees were being commingled and, in some cases, had been illegally placed in general revenue accounts. It reiterates the requirement that development fees are to be expended only on the public improvements for which the fee was collected. It also reminds local agencies that fees are not to be levied, collected, or imposed for general revenue purposes.
- Under Government Code section 66011, local agencies cannot collect fees from the reconstruction of any residential, commercial or industrial development that has been damaged or destroyed as a result of a natural disaster, as declared by the Governor. Fees can be assessed on that portion of the development which is not "substantially equivalent" to the property being rebuilt.
- Government Code sections 66013 and 66014 provide that fees for water or sewer connections and for zoning variances, zone changes, use permits, building inspections, building permits, planning services, subdivision maps, and LAFCO proceedings may be adopted without a public vote only when they do "not exceed the estimated reasonable cost of providing the service for which the fee is charged."
- Government Code section 66016 imposes a general requirement that newspaper notice be made and an open and public hearing held prior to approval of any proposed new fee or increase in existing fees. Prior to the hearing, the agency must make data on the estimated cost of services and the estimated revenues generated by the fees available to the public. This section prohibits the legislative body of the agency from delegating authority to enact new or increase existing taxes.
- Government Code section 66017 establishes a 60-day delay between the time a fee, charge, or an increase in a fee or charge is adopted and when it becomes effective. This section applies to fees for development projects as defined under section 66000.

  For those instances where fees are needed immediately, the statute also establishes an urgency procedure whereby, with four-fifths vote of the local legislative body, interim fees may be collected for up to 30-days. Not more than two 30-day extensions of the urgency fees can be voted by the legislative body. (Government Code section 66017 (b)).
- Pursuant to Government Code section 66020, any party may protest the imposition of fees, dedications, reservations or other exactions imposed on a residential housing development (including a tentative subdivision map or parcel map). To do so, the party must pay the exaction in full (or provide evidence of arrangements to pay) when due or otherwise ensure performance of the conditions imposed when required and serve the governing body of the agency with a notice that payment in under protest. A protest must be filed when the development is approved, or within 90 days of imposition of the exaction. The agency must notify the applicant in writing of the project's approval and beginning of the 90-day period in which to submit a protest. Any related court challenge must be filed by the party within 180 days of the agency's written notice.

  If a court upholds the challenge, the local agency must refund the fee collected, with interest. Amendments to the code require the court, if it grants a judgement to a plaintiff invalidating all or a portion of an ordinance or resolution enacting a fee, dedication, reservation, or other exaction, to direct the local agency to make the refund to a plaintiff or to any other person who paid the fee or exaction under protest. A local agency which has received such a protest cannot withhold approval or the issuance of permits for the residential project solely for that reason. However, when the permitting agency makes certain findings relative to the public health, safety, and welfare, they may suspend approval of the project pending either withdrawal of the protest, expiration of the 180-day time-limit without an action being filed or resolution of the action that is filed.
- Government Code section 66021 states that any party on whom a fee, tax, assessment, dedication, reservation, or other exaction has been imposed may protest. If the party files the protest under both section 66008 and 66475.4 (protest of subdivision exactions), then section 66475.4 shall prevail where conflicts exist between the two procedures. The protest procedures of section 66021 do not apply to the protest of any tax or assessment that is (1) levied under a principal act which contains its own protest procedures; or (2) pledged to secure the payment of

principal or interest on bonds or other public indebtedness.

- Government Code section 66022 provides that judicial challenges to fees adopted or amended under either section 66013 or 66014 must be mounted within 120 days of adoption or amendment. This also applies to fees that are amended automatically under the terms of a local resolution or ordinance. The agency imposing the fee bears the burden of proof in a legal challenge to its fee (section 66024).
- Government Code section 66023 establishes a procedure by which anyone may request an audit of a local agency's fees.

Other pertinent fee statutes include:

- Public Resources Code section 21004 limits mitigation measures to those which may be imposed by authority separate from the California Environmental Quality Act (CEQA). The local subdivision ordinance is an example of such an independent authorization for imposing exactions. CEQA itself provides no authority to impose fees or dedications.
- Government Code section 50030 provides that no permit fee imposed by a city or county for the placement, installation, repair, or upgrading of telecommunications facilities (lines, poles, or antennas) by a telephone corporation that has obtained all necessary authorizations from the California Public Utilities Commission and the Federal Communications Commission may exceed the cost of providing the service for which it is charged, nor be levied for general revenue purposes.
- Government Code section 65913.8 prohibits the use of fees imposed as a condition of development project approval to pay for maintaining and operating the infrastructure built with those fees. This statute offers two exceptions to its own rule for small developments where formation of a maintenance district is impractical or where maintenance is only to be funded during a temporary period while a maintenance entity is being formed.

Statutory Limits to Map Act Exactions

Section 66411.1 of the Map Act limits the improvements that may be required of a subdivision of five or fewer lots to the dedication of rights-of-way, easements, and the construction of offsite and onsite improvements. Installation of the improvements is not required until a permit is required for development of the new parcel or until construction is required under a schedule agreed upon by the jurisdiction and the subdivider. This limitation does not apply to Quimby Act exactions.

All or a portion of any land which has been dedicated in fee for public purposes (including public improvements and facilities, but not open space, parks or schools) is subject to reconveyance to the subdivider if, upon the request of the subdivider, the local agency determines that the public purpose for which all or a portion of the land was originally dedicated no longer exists or the property is not needed for public utilities (Government Code section 66477.5). Further, upon subdivision map approval, local agencies must attach a certificate to the approved map which states the name and address of the subdivider who is dedicating the land, a legal description of the dedicated land, and notice that reconveyance will be made under the circumstances described above. The reconveyance requirement applies only to land which was required to be dedicated on or after January 1, 1990.

The Map Act also creates a procedure for protesting dedications alleged to be excessive. Government Code section 66475.4 provides that a subdivider may bring suit against the local agency to determine whether a dedication "is not reasonably necessary to meet public needs arising as a result of the subdivision." This section does not apply to in-lieu fees. When a dedication is found to be excessive, the local agency must either:

(1) require redesign of the subdivision;
(2) pay compensation for the excessive portion of the dedication; or,
(3) require redesign of the subdivision to delete or modify the excessive dedication.

SERVICE CHARGES

Many of the service fees levied by local government are authorized by state enabling statutes. For example: waste disposal sites and services within county service areas under Government Code section 25210.77(e); water service connection charges under Water Code section 22281.1; and city sewer service or immediate availability charges under Government Code section 38902.

The local government's legislative body may impose fees for services only after a noticed public hearing. Pursuant to Government Code section 66014 et seq., when a local agency charges fees for zoning changes, zoning variances, use permits, building permits, building inspections, filing of applications for annexation or related reorganizations, subdivision maps, or planning services "those fees shall not exceed the estimated reasonable cost of providing the service for which the fee is charged." Fees which exceed the reasonable cost are considered special taxes and must be submitted to the jurisdiction's voters for a two-thirds vote approval. Water connection, sewer connection, and capacity charges are similarly limited under section 66013. The amount of the fee must be based upon a needs study or other evidence in the hearing record so that its reasonableness can be ascertained (Beaumont Investors *v. Beaumont-Cherry Valley Water District* (1985) 165 Cal.App.3d 227).

The Legislature approved a measure statutorily overturning the *San Marcos Water District v. San Marcos Unified School District* (1986) 42 Cal.3d 154 discussed earlier. Pursuant to Government Code sections 54999-54999.6, any public agency which has been providing public utility service may charge another agency a capital facilities fee or capacity charge to pay the capital cost of a public utility facility. However, new fees may only be imposed on state agencies, schools, and state colleges and universities under cooperative agreement with such agencies (section 54999.3). These fees and charges may be subject to Proposition 218, depending on the service being provided.

PROPERTY RELATED USER FEES AND STANDBY CHARGES

Proposition 218 has amended the State Constitution to state that "property related" fees and all standby charges may be imposed only upon voter approval. Although its provisions are not always reflected in statute, bear in mind that any statutory law or regulation which conflicts with Proposition 218 is null and void.

Under the express terms of the initiative, no fee or charge can be imposed or increased unless it meets all of the following requirements:

- the revenues derived from the fee do not exceed the funds necessary to provide the property related service;
- the revenues are not used for any purpose other than that for which the fee or charge was imposed; and
- the amount charged to "any parcel or person as an incident of property ownership" does not exceed the proportional cost of the service which is attributable to the parcel (Section 6(b), Article XIII D, California Constitution).

Further, Proposition 218 prohibits levying property related fees to pay for general governmental services, such as police, fire, ambulance, or library service which are available to the public at large; services which are not used by or immediately available to the property owner; and programs unrelated to the property related service. The initiative requires the repeal of all nonconforming fees by July 1, 1997.

Proposition 218 defines a fee or charge as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership [including tenants who are directly responsible for paying the fee or charge]" (Section 2(c) and (g), Article XIII D, California Constitution). It requires property owner approval of property related fees and charges, with the exception of fees and charges for sewer, water, and refuse collection services. Standby charges and charges for future services are now classified as special assessments (Section 6, Article XIII D, California Constitution). They can only be levied in accordance with the rules for special assessments described in Chapter III.

In order to impose (or in the case of existing fees, increase) property related fees and charges, the jurisdiction must:

- Identify the parcels upon which the fee or charge is to be imposed.
- Calculate the amount to be charged to each parcel.
- Notify by mail the record owner of each parcel of the proposed fee or charge. The notice must disclose the amount to be charged to that parcel, the basis for calculating the amount, the reason for which the fee is charged, and the date, time, and place of the public hearing to be held on the proposal.
- Hold a public hearing not less than 45 days after the mailing of public notice at which to consider protests against the proposed fee or charge. The proposal must be dropped if a majority of the affected property owners submit written protests at that time.
- Conduct a protest ballot not less than 45 days after the public hearing on the question of whether to impose the fee or charge (this assumes that a majority of written protests are not received at the hearing). The balloting may be conducted either among the affected property owners (simple majority necessary for approval) or among the electorate residing in the affected area (two-thirds majority necessary for approval). This may be carried out by mailed ballot, similar to the procedure for special assessments. In any case, no balloting is required for fees or charges for sewer, water, and refuse collection services.

The process for fees and charges differs in several respects from the process required for special assessments. First, the public hearing on the fees or charges is separated from the ballot by at least 45 days. For special assessments, the ballots are compiled at the public hearing. Second, a proposed fee or charge may be killed before going to ballot if a majority of the affected property owners submit written protests at the public hearing. Killing a proposed special assessment requires the return of formal ballots. Third, a jurisdiction proposing or increasing a fee or charge may place the question before either of two electorates: affected property owners (simple majority necessary for approval) or all voters residing within the area subject to the fee (two-thirds majority necessary for approval). A special assessment election is limited to affected property owners. Fourth, fees or charges for sewer, water, and refuse collection services are subject to public hearing and majority protest requirements, but not a protest ballot. After July 1, 1997 all special assessments will be subject to the voting requirements.

As with taxes and assessments, property related fees and charges are subject to repeal or reduction by voter initiative.

Chapter V
New School Facilities

Even before the passage of Proposition 13 in 1978, school budgets were largely determined by the state in compliance with the California Supreme Court's decision in *Serrano v. Priest* (1976) 18 C.3d 728. In that landmark case the court held that the California public school financing scheme violated constitutional equal protection guarantees by basing the availability of school revenues upon district wealth. The aftermath of the Serrano decision was state equalization of each district's allowable revenue limit and apportionment of state aid funds as the difference between that revenue limit and the district's proportional share of the county's local property tax revenues. Districts which receive a relatively greater share as a result of property tax revenues receive less money from the state.

Nonetheless, prior to Proposition 13 schools traditionally relied upon property taxes as a major revenue source. Proposition 13 affected schools by reducing this local income and making them more dependent upon state funding. Impact fee legislation passed in the early 1980's to fund interim school facilities provided some relief, but required the cooperation of affected cities and counties in levying a fee (revenue would be collected by the city or county and then transferred to the district). The 1984 California State Lottery Act provided schools with a new income source. However, lottery funds cannot be used for capital improvements such as school buildings (Government Code section 8880).

Today, squeezed between reduced property tax derived income and increased population, schools are employing several alternatives for funding new school construction. The following methods give school districts some measure of local control over financing.

Developer Fees

Unlike cities and counties, school districts do not have independent police power authority to impose development fees. Their authority to impose this kind of fee derives solely from Government Code section 53080 (note: in 1998, this section will be recodified as Education Code section 17620, pursuant to SB 1562 of 1996) and is subject to the limits discussed below (*California Building Industry Association v. Newhall School District, etc. et al.* (1988) 206 Cal.App.3d 212).

In 1986, the State Legislature approved AB 2926 (Chap. 887) which authorized school districts to levy development fees and at the same time placed a cap on the total amount of fees that could be levied. This method of financing new facilities immediately came into widespread use. In brief, it enables school districts to directly impose developer fees to pay for new school construction (Government Code section 53080). It also establishes that the maximum fees (adjustable for inflation) which may be collected under this and any other school fee authorization are $1.50/square foot of residential development and $0.25/square foot of commercial and industrial space (Government Code section 65995).

Legislative actions since 1986 have alternatively expanded and contracted the limits placed on school fees by AB 2926. In addition, AB 1600 of 1987 (discussed in Chapter II) has established a requirement that there be a nexus between school fees and the impacts created by new development. The current state of school exactions is summarized in the following paragraphs.

School districts may only impose fees, charges and dedications upon new industrial or commercial and new or other residential development as follows:

- Exactions shall be limited to $1.50 per square foot of "assessable space" for residential projects and $0.25 per square foot of "chargeable covered and enclosed space" for commercial or industrial projects. These amounts will be adjusted for inflation every two years. (Government Code section 65995) These limits apply to administrative actions which impose fees on development projects.
- New residential development shall be assessed on the basis of the number of square feet within the perimeter of the structure, not including any carport, walkway, garage, overhang, patio, detached accessory structure, or other similar area ("assessable space" under Government Code section 65995 (b)(1)).

- Fees, charges or dedications for other residential development can only be imposed if the development will result in a net increase in assessable space of 500 square feet or more. (Government Code section 53080).
- For purposes of determining the amount to be charged to industrial or commercial development, the square foot area of any structure existing on the site as of issuance of the first building permit shall not be counted. (Government Code section 53080).
- The fees, etc. collected pursuant to this statute cannot be used for regular maintenance or repair of school buildings or facilities, asbestos testing or removal activities, nor for deferred maintenance. These fees may, however, be used to pay for certain limited administrative costs. (Government Code section 53080).
- Commercial development shall be assessed on the basis of the number of square feet within the building perimeter, not including storage areas, parking structures, unenclosed walkways, or utility areas ("chargeable covered and enclosed space" under Government Code section 65995 (b)(2)).
- A school district may require fees from commercial or industrial development on either an individual basis or on the basis of categories of commercial or industrial development. Prior to imposing the fee, the district must conduct a study to determine the impact of the anticipated increase in commercial or industrial employees on the cost of providing school facilities. This study forms the basis of the district's findings under section 66000 et seq.

  The study must include employee generation estimates that are made by the district or based on the January 1990 edition of "San Diego Traffic Generators," a report of the San Diego Association of Governments. (Government Code sections 53080.1) Similar requirements were discussed in *Balch Enterprises v. New Haven Unified School District* (1990) 219 Cal.App.3d 783 which overturned commercial and industrial development fees imposed by a school district in Hayward and Union City.

  If fees are charged, the district must also provide the opportunity to appeal those fees on an individual basis. The party making the appeal carries the burden of proving that the fee was improper (Government Code section 53080.1).
- The school board may contract with the affected city or county for the purpose of having the city or county collect these exactions on behalf of the school district. (Government Code section 53080).
- The school board must hold a noticed public hearing prior to adopting or increasing a development exaction. The resolution enacting the exaction must contain findings in accordance with the provisions of Government Code sections 66000 et seq. In particular, the district must describe the impacts upon school facilities anticipated as a result of the commercial or industrial development. Upon adopting a resolution, the school board must notify all affected cities and counties in detail.

  A resolution imposing development exactions takes effect 60 days after its passage. The statute allows a school board, upon four-fifths vote of its membership, to pass an urgency resolution imposing the exaction immediately. Any party upon which an exaction is imposed may protest or appeal the exaction. (Government Code section 53080.1).
- When notified of a school facility fee, a city or county must not issue a building permit to an affected development project until the school district has certified that the project has either paid the fee or is not subject to the exaction. (Government Code section 53080). School fees are not subject to the requirement of Government Code section 66007 that restricts fee collection to that time when a final inspection is made of the project or a certificate of final occupancy is issued (*RRLH, Inc. v. Saddleback Valley Unified School District* (1990) 222 Cal.App.3d 1602).
- Exactions under section 53080 shall not be levied on the reconstruction of any residential, commercial, or industrial structure destroyed as the result of a disaster such as a fire, earthquake, landslide, flood, or tidal wave. Exactions can be levied on that portion of the reconstructed structure, if any, that exceeds the square footage of the original structure. (Government Code section 53080.6).
- Exactions levied on new construction of senior citizen housing, a residential care facility for the elderly or a multilevel facility for the elderly are limited to $0.25 per square foot of chargeable covered and enclosed space. Such structures may be issued building permits allowing them to be converted to another use upon certification by the school district that all required school facilities exactions have been paid. (Government Code section 65995.1).
- Motels, hotels, inns and other short-term lodgings are considered to be commercial or industrial development for the purposes of section 53080. (Government Code section 65995).
- Exactions cannot be levied on a facility that is used

exclusively for religious worship, owned and occupied by state, federal or local government, or is used exclusively as a private full-time day school. (Government Code section 65995).

The School Facilities Act (Government Code section 65970) provides a means for overcrowded school districts to receive fees for interim school facilities necessitated by new residential development. Such districts, upon making written findings of overcrowding and establishing a schedule of fees to pay for the interim facilities, must request that the local city council or board of supervisors adopt an ordinance imposing such fees. Fees are collected by the local government, placed in a separate account for the school district, and disbursed to the district each year.

The Schools Facilities Act differs from AB 2926 in that the district must be deemed overcrowded by the local school board in order for exactions to be levied. Further, the fee is always levied and collected by the local city or county on behalf of the school district (and upon the district's request). Previously, fees collected under the School Facilities Act could only be used for interim facilities. However, new law now enables a school district board that receives fees collected under a local regulation in existence on September 1, 1986 to use those funds for any "construction or reconstruction" allowable under section 53080, provided that the board first holds a public hearing on the subject of the proposed expenditure (Government Code section 65974.5).

AB 2926, on the other hand, is not restricted to overcrowded districts, the resulting funds may be used for either interim or permanent facilities, and fees are imposed directly by the school district. Because AB 2926 allows for the funding of permanent facilities, it has generally supplanted the use of the School Facilities Act.

School fees are subject to certain additional statutory restrictions:

- The legislature has declared that the subject of financing school facilities with development fees is a matter of statewide concern. Accordingly, the legislation described above occupies the field of mandatory development fees for school construction to the exclusion of all other local ordinances. (Government Code section 65995).
- The fee nexus and accounting requirements of the Mitigation Fee Act (Government Code section 66000 et seq.) apply to all school district exactions. The court in *Shapell Industries v. Governing Board of the Milpitas Unified School District* (1991) 1 Cal.App.4th 218 held that the developer is responsible only for that share of school need caused by new development, and set forth a three-part method for determining fees. First, since the fee is to be assessed per square foot of development, there must be a projection of the total amount of new housing expected to be built within the district. Second, in order to measure the extent of the burden imposed on schools by new development, the District must determine approximately how many students will be generated by the new housing. And finally, the District must estimate what it will cost to provide the necessary school facilities for that approximate number of new students. As noted in Chapter IV, the *Loyola Marymount* case has held that the higher scrutiny of the two-part *Nollan/Dolan* test does not apply to school fees.
- The fee cap established under these laws is the total amount of fees which may be levied for school facilities (Government Code section 65995). This includes fees intended to mitigate an environmental effect under the California Environmental Quality Act (Government Code section 65996). The fee cap does not apply to special taxes imposed under the Mello-Roos Community Facilities Act (Government Code section 65995; *Western/California Ltd. v. Dry Creek Joint Elementary School District* (1996) 50 Cal.App.4th 1461).
- When a school district establishes a Mello-Roos Community Facilities District (CFD) to finance the acquisition or improvement of school facilities, the property within that CFD is exempted from paying "any fee or other requirement" levied to benefit another school district if the fee was levied after the resolution of formation of the CFD was adopted. The affected school districts can, however, mutually agree upon other arrangements. This law took effect on September 30, 1989. (Government Code section 53313.4).
- Fees imposed on any mobilehome or manufactured home located within a mobilehome park or mobilehome subdivision that is limited to residence by older persons, cannot exceed those imposed on commercial or industrial development. If such a mobilehome park or mobilehome subdivision subsequently decides to permit residents other than older persons, it must notify the affected school district. Subsequent home installations for younger persons will be subject to residential fees. (Government Code section 65995.2).

Mello-Roos Act

The Mello-Roos Community Facilities District Act (Government Code section 53311 et seq.) allows financing districts to be established to fund school construction. The owners of land within the boundaries of a Mello-Roos Community Facilities District (CFD) are assessed a special tax to finance specific improvements within that district. Mello-Roos special taxes must be approved by 2/3 of the voters within the proposed CFD or, when the district has fewer than 12 property owners, by majority vote of the owners. Property owner elections may be held by mailed ballot, when approved by the county registrar of voters. The Rocklin Unified School District used this method in February 1989 when it created a 4454-acre Mello-Roos district to fund school construction in a rural area slated for rapid development. This taxing district will help finance six new K-6 schools and cost the eventual homeowners up to $400 per year. Proceeds from a Mello-Roos tax can be used to directly fund improvements such as new schools and also, if bonds have been issued, pay debt service on those bonds.

Mello-Roos financing affects the matching funds available from the State for school construction under the Leroy F. Greene State School Building Lease-Purchase Law of 1976. Under certain conditions, the amount of matching funds that the local school district must put up will be reduced by the amount of funding received as a result of CFD special taxes (Education Code section 17705.6). In effect, the funding provided by the CFD is counted toward the local matching share.

One advantage of the Mello-Roos Act over other sorts of financing is that it allows a school district to establish a financing district that does not include all the land within the boundaries of the school district. This means that newly developing areas, where demand for additional school facilities is greatest, can be isolated from those parts of the district in which facilities are adequate or where demand is otherwise low.

The Elk Grove Unified School District in Sacramento County made good use of this aspect of the Mello-Roos Act when faced with neighborhood opposition to its proposed special tax and school bonds. After its first attempt at forming a Mello-Roos CFD failed narrowly, the Elk Grove USD redrew the boundaries of the proposed financing district to eliminate mobilehome parks where citizens tended to be elderly and generally in opposition to the special tax. On its second attempt, the Mello-Roos district and its maximum bond issue limit of $70,000,000 were successfully ratified. The proceeds of the CFD will be used in conjunction with developer fees and state funds to meet the district's planned facility needs.

As of the end of 1988, the following were among the school districts using Mello-Roos financing:

- Chino Unified School District;
- Corona-Norco Unified School District;
- Elk Grove Unified School District;
- Empire Union School District (Stanislaus County);
- Etiwanda School District (San Bernardino);
- Fairfield-Suisun Unified School District;
- Irvine Unified School District;
- Mountain View School District;
- Oroville Elementary School District;
- Riverside Unified School District;
- Saddleback Valley Unified School District (Orange County);
- Sacramento City Unified School District;
- Tracy Area Public Facilities Financing Agency;
- Vallejo City Unified School District;
- Val Verde School District (Riverside County); and
- William S. Hart Union High School District

By the end of 1988, approximately $175 million worth of Mello-Roos bonds had been issued to finance school construction or for other educational uses. Of this total, approximately $85 million worth were sold in 1988 alone.

General Obligation Bonds

As a result of the passage of Proposition 46 in 1986, cities, counties, and school districts are again empowered to issue general obligation (G.O.) bonds to finance land acquisition and capital improvements, subject to voter approval. G.O. bonds are repaid with the revenues from increased property taxes (authorized by local voters as part of the G.O. bond measure). Approval by two-thirds of the voters within the school district is required for passage of a G.O. bond measure.

Statewide, the rate of passage for G.O. bond issues has averaged about 50%. The success rate was substantially higher in the first half of 1997. The amount of money being raised by bonds is considerable. Some $327 million worth of school bonds were approved in five Los Angeles basin districts in the June 1997 election alone.

Special Taxes

School districts may impose special taxes in the same manner as counties and cities, provided that the tax applies uniformly to all taxpayers or all real property within the district. This rule of uniformity contains an exception allowing taxpayers 65 years of age or older to be exempted from this kind of special tax. Under the provisions of Government Code section 50079, “qualified special taxes” (also called parcel taxes) may only be imposed when 2/3 of the school district’s voters approve the school board’s specific proposal for such a tax.

Proposition 218 has defined school districts as "special districts" for purposes of defining the type of taxes which a school district may impose and the voting requirements for those taxes. Under Article XIIIC of the California Constitution, a school district "shall have no power to levy general taxes." Taxes imposed by a school district, even if placed into the general fund of that district, are considered "special taxes" and cannot be imposed, extended or increased without approval of 2/3 of the district's voters.

According to information compiled by the School Service of California and Cal-Tax, 63 special tax elections for schools were held during the period between 1983 and April of 1988 with one-in-three being approved. Taxes proposed since that time have fared similarly

California Building Industry Association v. Newhall School District (1988) 206 Cal.App.3d 212 illustrates how careful school districts must be when creating a special tax. In overturning alleged special taxes in five Santa Clarita Valley school districts the Court of Appeal concluded that they were not special taxes because: (1) they applied solely to developers rather than uniformly to all taxpayers or landowners in the district; (2) they could be characterized as a development fee because they did not exceed the cost of contemplated school facilities and were imposed solely on those who were seeking to develop land; and, (3) at that time, school districts had no specific legislative authorization to levy special taxes (this has since been rectified by Government Code section 50079). Furthermore, the court held that because the exaction exceeded the limits imposed on development fees by Government Code section 65995, it was not valid as a development fee either.

Grupe Development Co. v. Superior Court (1993) 4 Cal.4th 911 is a recent court case which rules out the use of special taxes in districts which have levied full developer fees. In overturning a special tax levied by the Chino Unified School District, the state Supreme Court concluded that Government Code Section 65995 preempts all school district authority to levy special taxes for school construction if such taxes would cause the district to exceed the fee cap stipulated in the code, even though special taxes except for Mello-Roos taxesare not explicitly mentioned in the code. This decision was based on the language of section 65995 which placed a cap on fees of $1.50 per square foot of accessible space in residential dwellings. While exempting Mello-Roos taxes from this limit, the court concluded that as a matter of statutory construction, the explicit exemption of Mello-Roos special taxes indicated that the cap applied to all other special taxes. The court held that the intent of the legislature was to strike a balance between the need for adequate school facilities and affordable housing. The court said that “It would manifestly upset that balance to construe section 65995 to allow school districts to collect — as the District does here — special taxes to offset development costs *in addition to* the maximum amount authorized” under the code.

Special Assessments

In recent years, there has been a debate over whether a school district may impose assessments under the Landscaping and Lighting Act of 1972 for the maintenance of school yards. School districts have argued that they should be able to utilize the Act because they may be considered “special districts” for purposes of the Act and because they are authorized to undertake the sorts of improvements and carry out maintenance which the Act could finance. Further, they are statutorily authorized to make their facilities and grounds available for public use as civic centers and thereby offer a benefit to surrounding properties. Others have contended that the Act was not intended to apply to schools and in the absence of explicit reference, school districts should not be considered special districts under the Act.

The California Second District Court of Appeal rendered an opinion in May 1993 affirming the ability of two Southern California school districts to levy assessments to pay for the maintenance of school auditoriums, meeting rooms, gyms, stadiums, recreation and civic centers for the surrounding community (*Howard Jarvis Taxpayers Association v. Whittier Union School District* (1993) 15 Cal.App.4th 730). The court held that a school district is a special district for purposes of the 1972 Act. In addition, the levy of this special assessment by the districts does not violate the *Serrano* principle that limits the imposition of ad valorum property taxes that would make the quality of educational opportunity dependent upon the wealth of the school district’s property owners. The assessment is not based on property value, but rather on the relative degree of benefit which a parcel derives from the community facilities provided by the school.

In this case, the assessments were not levied for educational purposes (which was not approved by the court), but to finance recreational improvements to benefit the community. The districts demonstrated this by limiting their assessments to that portion of the total facility use that could be attributed to community activities.

This case does not offer *carte blanche* to school districts for the use of the Landscaping and Lighting Act. It does illustrate that a carefully designed assessment, limited strictly to financing those community facilities which the school provides, may offer an alternative financing method.

These assessments are subject to the voting requirements and are limited by Proposition 218 to properties which can be shown to derive a “special benefit” from the assessment (see Chapter III). Proposition 218 raises a substantial hurdle before districts that wish to use the Landscaping and Lighting Act.

Chapter VI
Leasing

For the most part, public agencies own their public facilities and equipment. However, leasing is becoming a popular alternative to outright purchase or issuing bonds to finance capital assets over a period of several years. Any agency authorized to acquire or dispose of real or personal property can enter into a lease. Counties, cities, school districts, and redevelopment agencies use this method of financing relatively commonly. For convenience, we will sometimes refer to all these local agencies as jurisdictions.

Lease financing is based upon a jurisdiction's authority to acquire and dispose of property rather than on its authority to incur debt. As a result, under state law, a properly constructed lease is not considered a public debt.

"Lease-purchase" agreements (in which the agency leases a facility while purchasing it) and "sale-lease-back" agreements (in which the agency sells a facility to a lessor and then immediately leases it back) offer several advantages over other financing methods. First, an agency can obtain a facility without a large initial investment. Second, the agency can obtain quick cash for a facility (although the cost of repaying the lease will exceed the sale price). Third, a lease can be used to spread the cost of a facility over a long period of time. Fourth, lease agreements do not contribute to a jurisdiction's Gann spending limit. Fifth, voter approval is not a requirement as it would be with special taxes and some types of bonds.

Using lease financing is not without its drawbacks. The agreements necessary to finance large capital facilities are complicated and involve numerous players such as bond counsel, underwriter, and trustee. Leasing, because of the uncertainties of the market and annual allocation of payments, may require higher debt payment than bonds in order to attract investors. Additionally, because leases are designed to be tax-exempt investments, their popularity and marketability is susceptible to changes in federal or state tax law. Also, it may be difficult to find single investors for some leases. Unlike special assessments or taxes, a lease does not generate funds on its own and requires another source of income to pay it off.

When a local agency enters into a lease arrangement (thereby becoming the leasee), it may lease a facility from another public agency, a nonprofit corporation set up for that purpose, a bank or private leasing company or a joint powers authority. This lessor assigns all its rights in the leased property or equipment to the lessee or trustee and acts as an intermediary between the local agency and the investors. The trick to leasing is finding someone who is willing to invest in the return from the agency's lease payments. This may be a single investor or, more frequently, a group of investors who have purchased undivided shares of the lease obligation (these shares are called "certificates of participation").

When a single investor is involved, that investor will generally be the lessor. The municipality leases a facility or equipment from the investor. As lessor, the investor then receives a portion of each rental payment as tax-exempt interest.

Certificates of Participation

Certificates of participation (COPs) are securities designed to make municipal leases accessible to the small investor by dividing the lease obligation into small parts. Each COP is an undivided share of the total lease obligation. The lessor assigns the lease to a trustee who then sells COPs in the lease. Purchasing a COP entitles the investor to a portion of the jurisdiction's lease payments. COPs are generally available in denominations of $5000 and marketed by firms specializing in municipal securities. Investors buy COPs as a source of tax-free interest income, so it is extremely important to be sure that the lease is structured in accordance with federal and state tax laws. Bond counsel and qualified financial advisors should be consulted when giving serious consideration to a COP issue.

Some examples of COPs include:

- Carlsbad's $8.7 million COP issue in 1988 financed the purchase of a 52-acre open space parcel.
- Colton sold $2,445,000 worth of COPs to finance multiple capital improvements in 1988.

- The City of Compton and the Compton Redevelopment Agency issued a $11,025,000 COP to refinance the city hall (thereby lowering the city's payments) and establish a $5 million self-insurance liability reserve.
- Cupertino sold $5 million worth of COPs in July 1989 to finance park improvements.
- The Hayward Unified School District issued a $2.5 million COP to finance K-12 school construction in 1988.
- The Humboldt Community Services District has issued a COP for over $1 million to finance water storage and distribution facilities.
- The City of Los Angeles issued COPs valued at $52,185,000 to finance equipment purchases including sanitation trucks, fire trucks, street maintenance equipment, and emergency vehicles.
- The Mid Carmel Valley Fire Protection District issued a $600,000 COP for buildings in July 1988.
- Rancho Cucamonga sold over $2.87 million worth of COPs to finance park improvements in December 1988.
- Santa Cruz County financed road improvements, buildings, and equipment worth $11,260,000 with two COP issues in 1983.
- The Vallejo Sanitation and Flood Control District sold COPs worth $12 million to finance wastewater collection and treatment facilities.
- Woodside used a COP in 1987 to finance $1.85 million worth of sewer pump station improvements.

Local agencies with projects that are too small to attract investors or to otherwise be feasible for lease financing have recently discovered the advantages of pooled COP issues. By pooling the COPs for several projects, several agencies can work together to minimize the costs of initiation and issuance. Economies of scale allow each local agency to minimize its costs of issuing a COP and may reduce the interest that must be paid on the lease. Because the use of COPs allows the project to be financed by many small investors rather than one large one, it increases the pool of potential investors.

Pooled COPS are offered through a Joint Powers Authority (JPA) created by the entities involved. Once the JPA is formed, it can be used repeatedly for additional COPs. However, all the leases being offered through each issuance of COPs must be entered into simultaneously. The economies of scale involved in pooled leasing are directly related to the size of the anticipated lease.

Here are two examples of pooled COPs. Los Angeles County schools issued pooled COPs worth $23 million in June 1987. In 1982, the cities of Arcata, Cloverdale, Healdsburg, Sebastopol, and Sonoma, acting as the Redwood Empire Financing Authority, issued COPs for over $1.54 million to finance fire station renovation and expansion, storm drain improvements, street lighting, and other utility improvements. See ***The Use of Pool Financing Techniques in California,*** published by the California Debt and Investment Advisory Commission, for detailed information on pooled COPs.

Lease Revenue Bonds

California law allows certain public entities to issue lease revenue bonds to finance capital improvements that are then leased to a public agency. The bonds' debt service is repaid from lease payments received from a public agency other than the issuer of the bonds. Again, this financing tool is designed to avoid classification as a debt and to be exempt from both Proposition 13 and Gann limit restrictions.

Lease revenue bonds may be issued by a nonprofit corporation under the Nonprofit Public Benefit Corporation Law (Corporations Code sections 5110 et seq.) and the Public Leaseback Act (Gov. Code sections 54240 et seq.), a parking authority created under the Parking Law of 1949 (Streets and Highways Code sections 32500 et seq.), a redevelopment agency (Health and Safety Code sections 33000 et seq.), or a joint powers authority under the Joint Exercise of Powers Act (Gov. Code sections 6500 et seq.). In general, lease revenue bonds may be more expensive to issue than general obligation bonds. Their advantages include the lack of a public vote requirement.

Sale-leaseback

In some ways, a sale-leaseback arrangement resembles the refinancing of a home. It allows a local agency to get money out of an existing facility or equipment and to pay the money back over time. Briefly, a sale-leaseback works like this: the municipality sells a facility or equipment to an entity such as a non-profit organization, an investor or a group of investors. The municipality then leases the facility or equipment for the period of time and at the rate of payment necessary to eventually buy it back, with interest.

Sale-leaseback has advantages for both investors and the municipality involved. The investor receives a stream of payments and interest from the local agency. If properly structured, these will be non-taxable. The local agency receives an infusion of cash which it may pay back in installments, while still being able to use the facility or equipment.

Lease-payback

This type of lease arrangement is a bit like leasing an automobile. It works like this: under agreement with a local agency, an investor or investors will construct a facility or obtain equipment for that agency. The agency then leases the facility or equipment from the investor at a rate sufficient to eventually pay for the cost of the facility or equipment, with interest. Upon completion of the payment schedule, the facility or equipment will become the local agency's property. Like the sale-leaseback agreement, investors are attracted to this arrangement by its tax-free return. Municipalities like it because it allows them to obtain property without a large initial investment and to pay it off in installments.

Whether any lease arrangement will be economical for the local agency depends upon a variety of factors including market conditions, the current tax laws, the structure of the lease, and the relative costs of other methods of financing. Local agencies should carefully evaluate these factors and compare their costs to other financing methods before entering into lease financing.

Two fine general sources of information on lease financing are the California Debt and Investment Advisory Commission's ***California Debt Issuance Primer*** and ***Guidelines for Leases and Certificates of Participation*** (CDAC 93-8), available from the Commission.

Chapter VII
Other Methods

GENERAL OBLIGATION BONDS

In June 1986, California voters approved Proposition 46, a constitutional amendment that restored to county, city, and school districts the authority to issue general obligation (G.O.) bonds. Each local G.O. bond measure requires approval by 2/3 of the jurisdiction's voters. These bonds are used to finance the acquisition and construction of public capital facilities and real property (see Government Code sections 29900 et seq., 43600 et seq., and Education Code section 15100 et seq., respectively). Bond proceeds cannot be used for equipment purchases nor to pay for operations and maintenance. Certain other local governments are also authorized to issue G.O. bonds upon voter approval, under specific legislation.

The local entity's governing body initiates a G.O. bond election by passing a resolution placing the proposed bond issue on the ballot. The resolution must specify the public project to be financed. Voter election packets must include information about the proposed increase in the tax rate, ballot arguments, and the specific uses of the proceeds of the bonds. If sources of income other than property taxes are to be used to service the bonds, the voter pamphlet must disclose the effects of that upon the projected tax rate.

The jurisdiction issuing a G.O. bond is authorized to levy an ad valorem property tax at the rate necessary to repay the principal and interest of the bonds. The property taxes being appropriated to a G.O. bond issue do not count towards the jurisdiction's Gann appropriations limit. State law sets the maximum indebtedness which entities may incur through G.O. bond issues. General law cities are limited to 15% of the assessed valuation of all real and personal property within their boundaries. Counties are limited to 5% of their assessed valuations. A unified school district is limited to 2-1/2% of its assessed valuation and an elementary or high school district is limited to 1-1/4% (Education Code sections 15106 and 15102).

G.O. bonds are backed by the full faith and credit of the issuing jurisdiction and are paid for by increasing local property taxes above the limit imposed by Proposition 13. This security is attractive to potential investors. Accordingly, G.O. bonds will generally carry a moderate interest rate. In addition, G.O. bond issues do not require a reserve fund during construction of the authorized capital improvement.

November 1986 was the first opportunity for localities to reenter the G.O. bond market since the passage of Proposition 13 in 1978. Eight of the 17 local measures proposed around the state were approved. Projects to be financed included new schools in Bakersfield and Clovis, a police building and jail in Pasadena, an adult/juvenile detention center in Los Angeles County, fire protection system improvements in San Francisco, purchase and renovation of a new civic center in Auburn, highway widening in Suisun City, and a wastewater treatment facility in Sebastopol.

G.O. bonds are increasingly popular. According to the California Debt and Investment advisory Commission, there were 27 G.O. bond measures on local ballots for the November 1996 election. Fourteen of these passed; of the 13 that failed, nine had received more than 60 percent of the vote.

Here are some examples of the G.O. bonds approved in November 1996:

- the Goleta Union School District in Santa Barbara County received authorization for $26 million to finance K-12 school facilities;
- the Peralta Community College District's voters approved an $8 million dollar bond issue for facilities improvements; and,
- Berkeley voters passed a $49 million measure to finance the seismic-safety retrofitting of its civic center and main library.

PUBLIC ENTERPRISE REVENUE BONDS

Cities and counties can issue bonds to finance facilities for revenue-producing public enterprises. This allows local governments to finance facilities, such as airports, water systems, sewer systems, and bridges, that can pay for themselves through service charges, connection fees, tolls, admission fees, and rents.

Revenue bonds do not require approval by two-thirds vote since they are neither payable from taxes, nor from the general fund. They are paid solely from a special fund consisting of the revenues generated by the facility being financed. Additionally, because the debt from revenue bonds in not generally a debt of the issuer, revenue bonds are not subject to the Gann limit.

The Revenue Bond Law of 1941 (Government Code sections 54300 et seq.) is the most popular of the many revenue bond acts available (a comprehensive list of these statutes can be found in the ***California Debt Issuance Primer*** published by the California Debt and Investment Advisory Commission). Under the 1941 Act, bonds may be issued for:

- water supply and distribution;
- garbage collection and disposal;
- sewage collection and treatment;
- parking;
- ferries;
- airports;
- harbors;
- hospitals;
- golf courses; and,
- electric generation and transmission.

These bonds may also finance the land, vehicles, facilities necessary to the allowable enterprises.

Bonds are authorized pursuant to the 1941 Act by resolution of the city's or county's legislative body, subject to approval by a simple majority of the voters voting on the bond measure. The legislative body's resolution must state the purpose for which the bonds are proposed, the estimated cost of construction, improvement, and financing, the principal amount of the bonds, and the rate of interest. Furthermore, it must set a date for election and fix the particulars of that election. The 1941 Act goes on to establish the specific procedures for issuing these bonds.

Examples of public enterprise revenue bonds include the following. In 1987, the City of Napa sold $16 million of bonds to use for refunding debt on water supply facilities and San Francisco sold over $106 million for the same purpose. In late 1988, San Franciso issued $45 million in bonds for wastewater collection and treatment facilities. At nearly the same time, Los Angeles was issuing $125 million worth of bonds for the same purpose. The Cambria Community Services District offered $1.32 million worth of bonds to refund debt associated with a wastewater treatment plant in 1989.

JOINT POWERS AGREEMENTS

A joint powers agreement (Government Code section 6500 et seq.) allows two or more agencies to jointly wield powers that are common to them. It does not create new powers, but instead provides a vehicle for the cooperative use of existing governmental powers. Agencies which may enter into joint exercise of powers agreements include the federal and state governments, cities, counties, county school boards, public districts, and public agencies of other states. A joint powers authority can enter into contracts, employ people, acquire, construct and maintain buildings, improvements and public works, and issue revenue bonds. The member agencies can also agree to exchange services.

The number of JPAs statewide has increased from 275 in fiscal year 1977-78 to 575 in fiscal year 1985-86 as agencies have found that creating a JPA can be a cost-efficient way to finance public buildings, capital improvements, police and fire protection, emergency medical services, libraries, and transportation. Self-insurance pools have accounted for a significant part of this increase. However, most JPAs are still concerned with providing infrastructure and services.

Examples of the use of joint powers agreements abound:

- the Councils of Government established as regional planning agencies around the state;
- the Orange County Major Thouroughfares and Bridge Funding Program (Orange County and its cities) being used to finance the construction of four major highway corridors;
- the Pomona Valley Transportation Authority (cities of Claremont, La Verne, Pomona, and San Dimas) providing transportation services;
- the North/Central Water Policy Planning Task Force (Santa Cruz County, Santa Cruz, Scotts Valley, Capitola, and five water supply agencies) formed to cooperatively plan for future water needs in Santa Cruz County; and,
- the Redwood Empire Financing Authority (Cloverdale, Healdsburg, Sebastopol, Sonoma, Arcata, and others) created to pool certificates of participation to fund public improvements.

A joint powers agreement must describe the purpose for which it is being entered into, the power to be wielded jointly, the method by which its purpose is to be accomplished, and the manner in which the powers are to be exercised. The agreement may be administered by one or more of the agreeing parties, by a commission or board created as part of the agreement, or by a person, firm or corporation designated in the agreement.

Money for projects to be completed under joint powers authorities is provided by the member agencies in a manner prescribed in the agreement of formation. The Orange County Major Thoroughfares and Bridge Funding Program uses funds collected by the county and cities as part of subdivision approvals. The JPA may be used as the leasor in a lease-purchase agreement. Agencies may pool equipment and manpower more efficiently than they could operate separately. In other words, the sources of income for a JPA are not limited to tax revenues. Additionally, joint powers authorities may issue revenue bonds for a long list of projects including:

- exhibition and fair buildings;
- stadiums or sports arenas;
- public buildings, including administrative facilities;
- regional or local public parks;
- mass transit facilities or vehicles;
- water supply or sewer facilities;
- criminal justice facilities;
- police or fire stations;
- local streets, roads and bridges;
- public libraries;
- low-income housing;
- public improvements related to redevelopment; and
- public improvements installed under the Mello-Roos Act or the 1911, 1913 or 1915 improvement acts.

(Government Code section 6546)

POOLED FINANCING

"Pools" have become a popular method of bringing together several agencies for the purpose of jointly issuing public debt (i.e., bonds, COPs, etc.). According to the California Debt and Investment Advisory Commission's publication ***The Use of Pool Financing Techniques in California***, the first pools in California were joint-use facility pools issued by joint powers authorities to finance capital improvement projects such as drainage systems which crossed jurisdictional lines. Now a variety of techniques are being employed to finance projects including water transmission facilities, wastewater management, and public buildings.

Pool financing techniques include:

- joint-use facility pools, where public agencies create a joint powers authority to develop, finance, and operate a project that will benefit the various agencies and which crosses jurisdictional lines;
- dedicated pools, in which a JPA or other joint authority issues debt on behalf of a known participant for a specific project;
- blind pools, in which a JPA issues debt prior to specifying the participants in the debt or the projects being financed; and,
- composite issues, which market together two or more separate debt issues from one or more issuers.

In all the above methods, except for composite issues, the investor is purchasing a percentage of the debt being issued and accepts the credit risk of all the participants acting under the joint authority. In a composite issue, the debt is pooled only for purposes of marketing and an investor accepts the credit risk of the particular issuer whose debt they have purchased. The California Debt and Investment Advisory Commission notes that pools are useful for public agencies with little or no potential by themselves for entering public debt markets, but that they cannot substitute for the basic criterion that the agency be able to repay its debts.

Pool financing, in its various guises, is too complex a subject to be adequately discussed in this short section. For a detailed examination of pooled financing methods, see ***The Use of Pool Financing Techniques in California: A Look at Joint Issuance Techniques***, published by the California Debt and Investment Advisory Commission. It carefully and impartially reviews the types of pooled financing that are currently available and describes their characteristics.

In 1996, the State Treasurer became very concerned over several bond pools which may have played fast and loose with the Marks-Roos Bond Pooling Act. These cases involved pools where the projects to be financed were not identified prior to issuance of the bonds and the agencies making up the JPA did not make the required finding that the financing would result in significant public (as opposed to private) benefit. While expressing a fear that these transactions were compromising the integrity of the municipal market, both with regard to the legality of the issuance and allegedly inadequate public disclosure of risks, the Treasurer asked both the State Attorney General and the Federal Security and Exchange Commission to investigate. As of this writing, the situation has not been resolved.

COUNTY SERVICE AREAS

(Government Code section 25210.1 et seq.)

The County Service Area Law was enacted in the early 1950's to enable counties to localize the provision and financing of expanded services, such as street lighting or flood control, in areas which desired or needed a higher level of public service. For example, when a county provides extra services to an urbanized unincorporated area through a CSA, the residents in the rural areas of the county who don't receive those services are not charged for them. By establishing county service areas (CSAs), counties may identify those areas which desire a higher level of specific services than those already uniformly provided within the entire county (including the cities). These extended services are financed by the taxpayers of the CSA. By isolating the extra services provided within the CSA, the county can insure that the additional services are paid for only by those who will receive them.

CSAs are relatively versatile mechanisms. They can provide any of a wide range of municipal services. A CSA may encompass all of the county's unincorporated area (Gov. Code section 25210.4c) or only selected portions. CSAs are limited, however, by the county's ability to show that the proposed level of extended service is not otherwise provided on a countywide basis.

CSAs are the most common type of special district in the state. The use of CSAs has increased steadily since the passage of Proposition 13. According to information compiled by the State Controller, in fiscal year 1977-78 there were 701 CSAs in California, of which 563 were active. By fiscal year 1986-87, that number had grown to 816 (of which 661 were active) despite the inevitable loss of CSAs due to new city incorporation. Fast-growing counties such as Orange, Riverside, Sacramento, and San Bernardino have substantially increased their use of CSAs since fiscal year 1977-78. So have developing rural counties such as El Dorado, Kern, and Tulare.

Powers

Pursuant to Government Code section 25210.4, a CSA can provide one or more of the following extended services:

- extended police protection;
- structural fire protection, including fire prevention, hazard abatement, and fire code enforcement (Government Code section 25210.5);
- local park and recreation or parkway facilities and services;
- extended library services and facilities;
- limited television translator facilities and services;
- low-power television services; and,
- "miscellaneous extended services" which the county is authorized to perform, but which are not already performed on a countywide basis.

  Government Code section 25210.4a defines miscellaneous extended services to include:

  - water service
  - sewer service
  - pest control
  - street sweeping
  - street lighting
  - refuse collection
  - garbage collection
  - ambulance service
  - planning services
  - soil conservation and drainage control
  - animal control
  - services provided by a municipal advisory council
  - transportation services
  - geologic hazard abatement
  - "road maintenance," including construction, improvement, engineering and design services, land acquisition, and maintenance of streets, highways, and bridges. (The state attorney general opines that this includes snow removal service (65 Ops.Atty.Gen. 176 (1982)).

Funding

CSAs are empowered to levy ad valorem property taxes to pay for the extended services that they provide. Now that Proposition 13 has limited the availability of property taxes as a funding source, most recently created CSAs rely upon other financing methods.

- Legislation enacted in 1989 specifies that the board of supervisors may levy and collect a special tax in any CSA or CSA zone (Chap. 360). The special tax must be approved by two-thirds of the qualified electorate before it may be enacted. Such a tax must be applied uniformly to all taxpayers or real property within the CSA or zone (Government Code section 25210.6a).

  In June 1990, special taxes were approved by voters in Santa Barbara County's CSA No. 3 (Goleta) for library services and in Marin County's CSA No. 17, for police services. In November of that year, special taxes for paramedic services were approved in Marin County's CSAs No. 13 and 19.
- Pursuant to Government Code section 25210.77a, a county may "fix and collect charges" for the "miscellaneous extended services" provided by a CSA. This revenue may be "in lieu of, or supplemental to, revenue obtained from the levy of taxes." These charges do not constitute ad valorem property taxes in the opinion of the state attorney general (62 Ops.Atty.Gen. 831 (1979)).

  Accordingly, a CSA may use benefit assessments to finance any of the services enumerated under Government Code section 25210.4a. Assessments must be apportioned to each parcel in proportion to the estimated benefits the parcel receives from the services being provided. The charges must be calculated yearly and confirmed by the board of supervisors at a public hearing.

- Local park, recreation or parkway services provided by a CSA may be financed by benefit assessments under the authority granted by Government Code section 25210.66a.
- A CSA may levy sewer or water service standby and immediate availability charges, with certain limitations, based upon relative benefit (Gov. Code section 25210.77b).
- A CSA providing fire protection services is empowered to levy a fire suppression assessment under Government Code section 50078 (see Chapter III).
- CSAs may issue G.O. bonds for capital improvements (but not services), subject to two-thirds vote within the district (Government Code section 25211 et seq.). For example, in 1988 the Spring Valley Lakes CSA No. 2 in Lake County issued $200,000 worth of bonds to finance a water storage and distribution project. Furthermore, a CSA may establish improvement areas which will be separately taxed to pay for the bonded indebtedness incurred for improvements within each such area (Government Code section 25211 et seq.).
- As a county-dependent entity, the CSA may issue revenue bonds. For example, in early 1987 San Luis Obispo County's CSA No. 18 sold a $450,000 public enterprise bond issue to pay for wastewater collection and treatment related improvements.
- The county may establish zones of benefit within a CSA. These zones effectively allow the CSA to levy different tax rates, service charges or connection charges upon properties based upon the level of services that they are receiving (Government Code section 25210.8).

Under current law, benefit assessments cannot be used to fund extended police service, extended library services, limited television translator facilities and services, or low power television services. As with all other public agencies which levy taxes, fees, and assessements, CSAs are subject to Proposition 218.

Formation

Nearly all CSAs are "dependent" special districts. Their governing bodies are usually the county board of supervisors. A CSA is established by the county, subject to prior approval of the proposed district by the Local Agency Formation Commission (LAFCO). The county board of supervisors may initiate formation proceedings on its own volition, upon receipt of a petition signed by voters in the proposed area, upon receipt of a resolution from any city in the county, or upon the request of two members of the board. As a condition of its approval, the LAFCO may limit the powers of the CSA to those specifically approved by the county (expansion of those powers would then require subsequent approval by the LAFCO).

After approval by the LAFCO, the supervisors must either adopt a resolution of intention to establish a CSA or, if so authorized by the LAFCO, a resolution establishing the CSA without notice and hearing, and without an election. The resolution of intention describes the boundaries of the proposed CSA, the services that it is to provide, and sets a time and place for a public hearing on the matter. Public notice must be published in a newspaper of general circulation and a hearing held for the purpose of receiving protests from involved citizens. Proceedings must be abandoned if the county receives protests from either 50% or more of the registered voters or from 50% or more of the landowners. After conclusion of the hearing, the board may adopt a resolution which either: (1) establishes the CSA (and describes the area boundaries and services to be provided) without an election or, (2) establishes the CSA subject to confirmation by area voters at a special election. CSAs approved without an election may be subjected to referendum.

When establishing a CSA, the county must determine whether "specified services or the level of these services are being provided throughout the county on a uniform basis within and without cities" (*City of Santa Barbara v. County of Santa Barbara* (1974) 94 Cal.App.3d 277). The county must show that the proposed level of extended service is not already provided on a uniform basis.

COMMUNITY SERVICES DISTRICT

(Government Code sections 61000 et seq.)

The community services district or CSD is a stalwart source of funding for services in both unincorporated and incorporated areas. Because it may be used to pay for a wide variety of facilities and services, the CSD is often looked upon as a sort of mini-government in its own right. As of fiscal year 1986-87 there were 280 CSDs (of which 262 are active). There were 212 CSDs in FY 1977-78, of which 200 were active. A number of rural counties, including Calaveras, El Dorado, Lake, Monterey, Nevada, and Yolo, have significantly increased their use of CSDs since 1978.

Powers

Government Code section 61600 provides that a CSD may exercise the following powers:

- supplying domestic, irrigation, sanitation, industrial, fire protection, and recreational water;
- collection, treatment, and disposal of sewage and storm water;
- garbage collection and disposal;
- fire protection;
- public recreation, including aquatic parks and recreational harbors, playgrounds, golf courses, swimming pools or recreation buildings;
- street lighting;
- mosquito abatement;
- equipment and maintenance of a police department or police protection;
- acquisition, construction and maintenance of library buildings and to provide library service (in cooperation with other agencies);
- construction, surfacing, and maintenance of streets (subject to the consent of the affected city or county);
- construction and improvement of bridges, culverts, drains, and curbs incidental to roads (subject to the consent of the affected city or county);
- undergrounding of existing overhead public utility lines;
- ambulance services (when approved by a majority of the voters in the district in an election for that purpose);
- providing and maintaining public airports;
- providing transportation services; and
- graffitti abatement.

Some CSDs have also been granted certain additional powers on an individual basis, such as the ability to construct and operate hydroelectric power generation facilities.

Funding

CSDs are empowered to levy ad valorem property taxes, general taxes, special taxes, special assessments (upon formation of an improvement district within the CSD), water standby and delivery charges, and “rates and other charges.” The California Attorney General stated in a 1987 opinion that fees assessed against real property in a CSD must directly relate to the benefit being received (70 Ops.Cal.Atty.Gen. 153). A CSD may be broken into zones for the purpose of financing capital improvements or services that will benefit only limited areas of the CSD. Within each such zone, bonds may be issued, special rates or charges may be collected, or special taxes levied to pay for the improvements or services being provided.

The effect of Proposition 218 on Community Services District financing is unclear at this time. Section 2 of Article XIII C of the California Constitution now states that "[s]pecial purpose districts or agencies, including school districts, shall have no power to levy general taxes." Some argue that because a CSD is a multi-purpose, as opposed to "special purpose" special district (Proposition 218 defines "special district," but not the term "special purpose district"), the initiative's restriction on general taxes does not apply to CSDs. It will be up to the Legislature and the Courts to clear up this ambiguity.

Improvement districts to finance improvements or facilities authorized of a CSD may also be formed, as provided under irrigation district law (Water Code section 236000, et seq.). Assessments within an improvement district must be levied, collected, and enforced in practically the same manner as annual taxes. Further, advance public notice must be provided for new or increased assessments pursuant to Government Code section 54954.6.

Here are some examples of CSD project financing reported to the California Debt Advisory Commission:

- Glenn County’s Northeast Willows County Services District issued $325,192 in special assessment bonds in October 1989 to finance a wastewater collection and treatment plant.
- In late 1988, the Vandenberg Village CSD in Santa Barbara County issued $1.6 million in public enterprise revenue bonds to finance wastewater collection and treatment and $3.8 million in similar bonds to finance water supply improvements.
- In 1987, the El Dorado Hills CSD in El Dorado County issued a $4 million G.O. bond to finance multiple capital improvements. Santa Barbara County’s Los Alamos CSD issued a $474,000 special assessment bond to pay for wastewater treatment facilities. The Humboldt CSD issued COPs for $1.04 million to finance water supply and distribution improvements. The Lake Arrowhead CSD in San Bernardino County sold COPs worth $21.6 million to finance wastewater treatment facilities.
- In 1985, Marin County’s Bel Marin Keys CSD issued $1.76 million of special assessment bonds for harbor improvements. Riverside County’s Santa Rosa CSD issued $1.74 million of special assessment bonds for water supply and distribution improvements.

Formation

CSD formation proceedings are begun by filing a petition, signed by 10% or more of the proposed district's registered voters, with the county LAFCO. Only contiguous, unincorporated area can be included in the proposed boundaries. The LAFCO will convene a public hearing at which to consider the formation request. After hearing testimony, the LAFCO will either approve, modify or deny the proposal. If it is approved, the LAFCO will adopt terms and conditions for the formation and establish a sphere of influence for the CSD. Then, the LAFCO will direct the county board of supervisors to hold a hearing on the proposal.

If, at the hearing, the board of supervisors finds that 80% or more of the registered voters within the proposed district have signed the petition requesting formation, and no protests have been received, the supervisors may order the CSD formed without an election. The receipt of protests requires that the board consider whether an election should occur. An election cannot be waived when a proposed CSD crosses county lines. If an election is held and a majority of the qualified voters are in favor, the district will be formed. Upon formation, the supervisors will issue a resolution of formation establishing the boundaries of the district, its purpose(s), and its name.

Once a CSD is created, its boundaries may be altered and contiguous or noncontiguous unincorporated area added. In addition, incorporated territory located adjacent to the CSD may be annexed with the permission of the affected city. Annexation proceedings are initiated in accordance with the Cortese-Knox Act (Gov. Code section 56000 et seq.) and administered by the county LAFCO.

A CSD is governed by a three or five member board of directors elected from among the registered voters residing within the district boundaries. The number of directors is established in the resolution of formation approved by the board of supervisors. Alternatively, the board of supervisors or city council may constitute the directors of the CSD. Unlike CSAs, most CSDs are independent districts with their own board of directors (there were only nine dependent CSDs statewide in fiscal year 1986-87).

Appendix

Text of Proposition 218

This initiative measure adds Articles XIII C and D to the California Constitution.

RIGHT TO VOTE ON TAXES ACT

SECTION 1. TITLE.

This act shall be known and may be cited as the "Right to Vote on Taxes Act."

SECTION 2. FINDINGS AND DECLARATIONS.

The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.

SECTION 3. VOTER APPROVAL FOR LOCAL TAX LEVIES.

Article XIII C is added to the California Constitution to read:

ARTICLE XIII C

SECTION 1. Definitions.

As used in this article:

(a) "General tax" means any tax imposed for general governmental purposes.

(b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

(c) "Special district" means an agency of the state, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

(d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

SEC. 2. Local Government Tax Limitation.

Notwithstanding any other provision of this Constitution:

(a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.

(b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.

(c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).

(d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

SEC. 3. Initiative Power for Local Taxes, Assessments, Fees and Charges.

Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.

SECTION 4. ASSESSMENT AND PROPERTY RELATED FEE REFORM.

Article XIII D is added to the California Constitution to read:

ARTICLE XIII D

SECTION 1. Application.

Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority. Nothing in this article or Article XIII C shall be construed to:

(a) Provide any new authority to any agency to impose a tax, assessment, fee, or charge.

(b) Affect existing laws relating to the imposition of fees or charges as a condition of property development.

(c) Affect existing laws relating to the imposition of timber yield taxes.

SEC. 2. Definitions.

As used in this article:

(a) "Agency" means any local government as defined in subdivision (b) of Section 1 of Article XIII C.

(b) "Assessment" means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment" and "special assessment tax."

(c) "Capital cost" means the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency.

(d) "District" means an area determined by an agency to contain all parcels which will receive a special benefit from a proposed public improvement or property-related service.

(e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.

(f) "Maintenance and operation expenses" means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.

(g) "Property ownership" shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.

(h) "Property-related service" means a public service having a direct relationship to property ownership.

(i) "Special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."

SEC. 3. Property Taxes, Assessments, Fees and Charges Limited.

(a) No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:

(1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A.

(2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIII A.

(3) Assessments as provided by this article.

(4) Fees or charges for property related services as provided by this article.

(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership.

SEC. 4. Procedures and Requirements for All Assessments.

(a) An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.

(b) All assessments shall be supported by a detailed engineers report prepared by a registered professional engineer certified by the State of California.

(c) The amount of the proposed assessment for each identified parcel shall be calculated and the record owner of each parcel shall be given written notice by mail of the proposed assessment, the total amount thereof chargeable to the entire district, the amount chargeable to the owners particular parcel, the duration of the payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, together with the date, time, and location of a public hearing on the proposed assessment. Each notice shall also include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return, and tabulation of the ballots required pursuant to subdivision (d), including a disclosure statement that the existence of a majority protest, as defined in subdivision (e), will result in the assessment not being imposed.

(d) Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agencys address for receipt of the ballot once completed by any owner receiving the notice whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.

(e) The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. At the public hearing, the agency shall consider all protests against the proposed assessment and tabulate the ballots. The agency shall not impose an assessment if there is a majority protest. A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.

(f) In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.

(g) Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment. If a court determines that the Constitution of the United States or other federal law requires otherwise, the assessment shall not be imposed unless approved by a two-thirds vote of the electorate in the district in addition to being approved by the property owners as required by subdivision (e).

SEC. 5. Effective Date.

Pursuant to subdivision (a) of Section 10 of Article II, the provisions of this article shall become effective the day after the election unless otherwise provided. Beginning July 1, 1997, all existing, new, or increased assessments shall comply with this article. Notwithstanding the foregoing, the following assessments existing on the effective date of this article shall be exempt from the procedures and approval process set forth in Section 4:

(a) Any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

(b) Any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

(c) Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States.

(d) Any assessment which previously received majority voter approval from the voters voting in an election on the issue of the assessment. Subsequent increases in those assessments shall be subject to the procedures and approval process set forth in Section 4.

SEC. 6. Property Related Fees and Charges.

(a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. Reliance by an agency on any parcel map, including, but not limited to, an assessors parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

(c) Voter Approval for New or Increased Fees and Charges. Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

(d) Beginning July 1, 1997, all fees or charges shall comply with this section.

SECTION 5. LIBERAL CONSTRUCTION.

The provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

SECTION 6. SEVERABILITY.

If any provision of this act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.

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